RNI No. MAHBIL /2009/31744
Reg. No. MH/MR/South-318/2013-15

महाराष्ट्र शासन राजपत्र

भाग एक–ल

वर्ष ६, अंक १२] गुरुवार ते बुधवार, मे २९-जून ४, २०१४/ज्येष्ठ ८-१४, शके १९३६ [पृष्ठे ४०, किंमत : रुपये २३.००

प्राधिकृत प्रकाशन

(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील (भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त) अधिसूचना, आदेश व निवाडे.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA, AT KOLHAPUR

REVISION APPLICATION (ULP) No. 36 of 2000.—Acting Manager, Shri Veershaiv Co-operative Bank Ltd., Kolhapur, 577/A-1, Tararani Chowk, Kohapur—*Petitioner—V/s*—Shri Baburao Appasaheb Patil, H. No. 17, Ward No. 1, Ichalkaranji, District Kolhapur—*Respondent.*—REVISION APPLICATION (ULP) No. 62 of 2000. Shri Baburao Appasaheb Patil, H. No. 17, Ward No. 1, Ichalkaranji—*Petitioner—V/s*—Acting manger, Shri Veershaiv Co-op. Bank Ltd., Kolhapur.—*Respondent.*

In the matter of Revision u/s 44 of the M. R. T. U. and P. U. L. P. Act, 1971.

CORAM.— Shri C. A. Jadhav, Member.

Advocate.— Shri R. L. Chavan, Advocate for the Petitioner–Bank.

Shri K. D. Shinde, Advocate for the Employee.

Judgment

1. These Revisions are arising out of Judgment and order passed in complaint (ULP) No. 243 of 1993 by Labour Court, Kolhapur, whereby an employer -Bank is directed to reinstate an employer-Clerk with continuty of service, ithout back wages holding that findings of the Enquiry Officer are partly perverse and dismissal is an unfair labour practice under items 1 (a), (b) and (g) of Sch. IV of the M. R. T. U. and P. U. L. P. Act.

2. Revision application (ULP) No. 36 of 2000 is filed by the Bank challenging entire judgment and order whereas-Revision Application (ULP) No. 62 of 2000 is filed by an employee-clerk to the extent of refusel of back wages.

3. Admittedly, the Bank served Chargesheet dated 17th May 1990 on the employee clerk hereinafter referred to as the Complainant) alleging cheating, making false entries in Bank Accounts, negligence and failure to obey orders of superiors Then an enquiry took place. The Complainant engaged two advocates to represent him in the enquiry. The Enquiry-Officer on completion of enquiry, held that all charges except failure to obey orders of superiors are proved. Ultimately, the Complainant was dismissed from service on 23rd October 1993.

4. The Complainant then filed above complaint on 1st November 1993 alleging that Bank's Directors, higher Officers, Acting Manager and ex-Manager in collusion with each other, misappropriated Bank's amounts by favourting some parties. Eventually, one Board Member Shri S. P. Patil filed criminal complaints against Bank's Higher Officer and other Board of directors. Co-operative Department of Government of Maharashtra also made querries and sought explanation from concerned persons. The Bank then to escape from criminal cases, an explanation of Co-operative Department, made scape goat and served false chargesheet. He replied thereof that Shri Solapure, Shri Hingmire, Shri K. V. Patil and Shri Swami were responsible for alleged misappropriation. Alleged misappropritated amount was remitted by Shri Hingmire and Shri K. V. Patil. Shri Hingmire and Shri Solapure accepted their liability and resigned from their post. Even then he is falsely chargesheeted.

5. It is further alleged that the very appointments of the Enquiry Officer is illegal as the same is made by an unauthorised person. Besides, the enquiry is not fair and proper and findings of the Enquiry Officer are perverse. The enquiry is hit by provisions of Section 78(1) (D) of the B. I. R. Act and hence stands vitiated.

6. It is further contended that his past record of 18 years is clean and unblamished and punishment of dismissal is an unfair labour practice. Besides, punishment of dismissal with retrospective effect is unsustainable in law.

7. On above averments, the Complainant prayed requisite declaration of unfair labour practice, direction to reinstate him with continuity of service and full back wages and other consequential reliefs.

8. The Bank filed its written statement at Ex. 13 and traversed all material allegations made by the Complainant. It contended that the Complainant was mainly entrusted with work of hypothication, cash credit and was put in additional charge of godown-keeper. The Complainant was not bount to obey unlawful and illgal orders of superiors. In fact, the Complainant made false entires in ledgers in collusion with clerk Shri Hingmire, Ex-manager Shri Solapure. The Complainant, Shri Hingmire and Shri Swami misappropriated Bank's fund. Shri Hingmire remitted misappropriated amount and resigned from service. Resignation given by Shri Solapure was not accepted and he was dismissed from service after an enquiry. The Complainant tampered Bank's record and thereby committed fradulent and dishonest act. Eventually, he was chargesheeted. The enquiry is fair and proper and findings of the Enquiry Officer are well justifiable. Thus, the Bank justified its action and prayed for dismissal of the complaint.

9. Learned Labour Court, held *vide* order dated 15th March 1996 that enquiry is fair and proper. Both parties did not lead oral evidence. The Bank produced entire enquiry papers and findings of the Enquiry Officer.

10. The Labour Court, on perusal of documentary evidence and hearing both parties, observed that the chargesheet nowhere alleges wrongful gain to the Complainant or others or wrongful loss to the bank and, therefore, charge of dishonesty and fraudulent act is not established. It then held that, therefore, findings of the Enquiry Officer that charge of dishonesty and fraud is proved, is perverse. However, it held that fidings of the Enquiry Officer that charge of negligence is proved, is legal and proper. As regards retrospective termination, it held that retrospective part of the dismissal order is illegal.

11. On the point of punishment, the labour Court obseerved that the Bank accepted resignation of Shri Hingmire and he was paid retirement/terminal benefits. Therefore, punishment of dismissal inflicted upon the Complainant is discriminative and victimisation. Eventually, it held that Bank's action of dismissing the Complainant is legal victimisation and the punishment for negligence only is shockingly disproportionate. It further held that bank's action is hit by section 78(1) (D) of the B. I. R. Act as there is no explanation regarding delay and non-completion of enquiry within six months. Ultimately, it held that refusal of back wages for proved misconduct of negligence is proper punishment and directed reinstatement with continuity of service without back wages, *vide* its order dated 7th February 2000. The same is challenged in these revisions.

12. I heard both Advocates at length. Considering rival submissions, following points arise for my determination :—

(*i*) Whether impugned finding that Enquiry Officer's finding regarding establishment of charge of fraud and dishonesty is perverse, is justifiable ?

(*ii*) Whether impugned finding that punishment of dismissal is legal victimisation, is justifiable ?

(*iii*) Whether impugned finding that punishment of dismissal is hit by Section 78(1) (D) of the BIR Act is sustainable in law ?

(*iv*) Whether impugned finding that punishment of dismissal is discrimination and shockingly disproportionate is justifiable ?

(*v*) Whether impugned finding refusing to award back wages is justifiable ?

(*vi*) What order ?

13. My findings, on above points, are as under :—

(*vi*) What order ?

(*i*) Yes.

(*ii*) Yes.

(*iii*) Yes.

(*iv*) Yes.

(*v*) Yes.

(*vi*) Both revisions applications are dismissed.

Reasons

14. It is alleged in the chargesheet that the Complainant fraudualent and dishonest act by making false entries in the ledgers, thereby cheated the Bank, was further negligent and dis-obeyed orders of superiors. The Complainant gave an explanation dated 21st May 1990 that he acted as per directions of the superiors and denied all allegations of misconduct. The enquiry papers contained Complainant's 3 letters (Ex. 79 to 81) addressed to Bank's General Manager in December, 1989, wherein he has admitted that he has made entries as per directions of his superior Officers.

15. Shri Chavan, learned Advocate representing the Bank vehementaly argued that plea of making entries as per directions of the Superiors is totally after thought as the Complainant nowhere complained against such illegal directions. He further added that the Complainant has not examined himself in the enquiry and such fact is self-eloquent. Dishonesty cannot be judged on the principles of criminal jurisprudence. The Bank is a service industry wherein absolute devotion, integrity and honesty is must. The Complainant made false entries in the ledger and as such the act clearly establishes dishonesty. Even then, the Labour Court recorded a perverse finding that Enquiry Officer's finding regarding establishment of charge of fraud and dishonesty is perverse Learned Labour Court cannot be sit in a Appellate jurisdiction against findings of Enquiry officer. Therefore, no interference can be made as findings of the Enquiry Officer are findings of fact. Besides, his termination is also on the ground of loss of confidence. In support of his arguments, he relied on the decision of Hon'ble Apex Court in *Anil Kumar (Dr.) V/s Union of India and others reported in 2000 (86) F. L. R. at page 151* and *Disciplinary Authority V/s Nijunja Patanik reported in 1996 I CLR at page 951.* He fuether submitted that in any case the Labour Court ought to have extended an opportunity to the Bank to substantiate its action after holding findings of the Enquiry Officer as perverse.

16. Shri Shinde, learned Advocate representing the Complainant countered above arguments and replied that the Complainant was working as clerk, was at the bottom of hierarchy and had no independant authority to grant cash credit or loan to the borrowers. He further added that ex-Manager Shri Solapure committed entire misappropriation with the help of cashier Shri K. V. Patil and they both remitted the misappropriated amount. It is nowhere alleged in the chargesheet that the Bank suffer wrongful loss or the Complainant had wrongful gain to himself or someoneelse due to Complainant's misconducts. Eventually, charge of dishonesty and fraud fails at the very thrashhold itself. The Labour Court has rightly accepted such proposition of law holding that such findings of the Enquiry Officer is parverse. In support of his arguments, he relied on the decision in *Babanrao Budhajirao Nanekar V/s Adinath Sahakari Bank Ltd. reported in 1995 (2) Mh. L. J. at page 154 (B.H.C.)*

17. There cannot be second opinion to the proposition that the Labour Court can sit as an Appellate Court against report of Enquiry Officer and scops of judicial review is limited. I am respectfully bound by the aforesaid decision rlied by Advocate Shri Shinde.

18. Absolute devotion, deligence integrity and honesty nees to be preserved by every Bank employes. otherwise confidence of the public or disturbance get impared. In Babenrao Nanekar's case His Lordship have fully illustrated meaning of negligence and dishonesty. It is observed that that disbonesty nacessarily requires advetance of mind and intention to casuse wrongful loss to the employer and wrongful gain to the employee or to someoneelse. However, negligence can arise only when there is utter lack of advertence to the bare requisites of pracaution to be observed while discharging duty. It is further observed that two heads of misconducts *i. e.* dishonesty and negligence are not only antithetical but are also mutually and exclusive. It is further clarified that if the Enquiry Officer accepts the same evidence as indicative of two heads of charges which are mutually exclusive, perse. It is indicative of non-application of mind on his part and a finding of such a nature would be perverse.

19. The Enquiry officer has come to the conclusion that the Complainant made wrong entries in the and other Accounts. But he has specifically held that he is not liable regarding entry of Rs. 75000 and Rs. 30000 He has further observed that Complainant made false entries in collusion with Accountant Shri Hingmire and it amounts to cheating the Bank.

20. It has nowhere come in the enquiry or even alleged in the chargesheet that the Complainant caused wrongful loss to the Bank and wrongful gain to himself or to someone else. Freaudulent act of an employee is deception for benefit of deceiving others. Eventually, there are no ingredients whatsoever in the chargesheet as well as in the enquiry regarding fraud and dishonesty. The Enquiry Officer has misdirected himself holding that charge of fraud and dishonesty is proved simply on the ground that the Complainant made false entries. There is absolutly nothing on record to show that Bank suffered financial loss due to such entries by the Complainant. On the contrary, ex-Manager and the Cashier have remitted the misappropriated amount. I, therefore, find that learned Labour Court has rightly held that Enquiry Officer's Affirmatives finding of fraud and dishonesty is perverse. Labour Court's such finding is within the ambit of judicial review and well sustainable in law. The Enquiry Officer has not even whispered in the report that acts of the Complainant has resulted into wrongful loss to the bank and wrongful gain to the Complainant himself or to some-one-else. Accordingly, I Answer Point No. 1 in the affirmative.

21. As regards extending opportunity to the Bank to substantiate its action by leading evidence as a whole, there is No such prayer in the written statement. Thus, the learned Labour Court was well justified in proceeding further.

22. Advocate Shri Chavan further canvassed that Branch Manager Shri Solapure is dismissed after enquiry. Accountant Shri Hingmire has resigned. Cashier Shri K. V. Patil and Swami are dismissd. As such, there is no victimisation at all. For that all, he placed reliance in the decision in *Tourist Hotel* V/s. *Sitaram Shripati Kamble reported in 2001 I LIR at page 40 (Bom. H. C).* It is observed that the other workman gave his resignation and submit quietly after the incident and therefore, there was sufficientmore fact of punishing him does not amount to victimisation.

23. Advocate Shri K. D. Shinde argued that Shri Hingmire was allowed to resign and was paid retirement/terminat benefits. On the contrary, resignation of Shri Solapure was not accepted but he was dismissed after holding enquiry. There is no explanation as to why Shri Hingmire's resignation was not refused and was not properly dealt with. Thus,exceptional treatment to Shri Hingmire amounts to victimisation. In support of his arguments, he relied on the decision in Colour Chem Ltd. *V/s.* A. S. Aalaspurkar reported in 1998 I CLR at page 638.

24. Learned Labour Court has observed that there is no evidence that Complainant's past record is bad. He has worked for about 18 years and, therefore punishment of dismissal for proved negligence is shockingly disproportionate. In addition, another responsible superior officer was allowed to resign by paying retirement/terminal benefits and hence punishment of dismissal amounts to legal victimisation.

25. In my judgment, proved misconduct is negligence only. Misconduct of dis-honesty and fraudulent act is not established. The very act of allowing another responsible superior officer to retire and paying retirement/terminal benefits is well indicative of exceptional treatment. Punishment of dismissal especially when the Complainant has rendered unblamished service of 18 years, is certainly shockingly disproportionate. Imposing punishment of dismissal for negligence only can well be said as legal victimisation. I, therefore, find that learned Labour Court has rightly held that punishment of dismissal is shockingly disproportionate and legal victimisation. Accordingly, I answer point No. 2 in the affirmative.

26. Bank's Board of Directors dismissed the Complainant by order dated 23th October 1993 with effect from 19th October 1993. It is held in *U. P. State Road Transport Corporation V/s V. P. Public Service Tribunal reported in 1990 II CLR at page 810* that order of dismissal with retrospective effect cannot be passed, such order is serverable and retrospective part of the order can be set aside without disturbing main order of dismissal. I, therefore, find that learned Labour Court has rightly held that dismissal of the Complainant from 19th October 1993 till 23rd October 1993 is illegal.

27. Advocate, Shri Chavan further argued that the enquiry commenced on 18th August 1991 and was completed on 25th July 1993. But that does not automatically invoked provisions under section 78 (*1*) (*D*) (*i*) of the B. I. R. Act. The charges were complex and it consumed more time to complete the enquiry. Mere delay alone is insufficient to vitiate the enquiry. In fact, no prejudice is caused to the Complainant on account of delay. For that end, he relied one decision in *G. Anandan V/s T. N. University Board and Another reported in 1997 I CLR at page 518*. He further added that above provision under the B. I. R. is directory and not mandatory. As such, finding of the Labour Court that punishment is hit by Section 78 (*1*) (*D*) (*i*) of the B. I. R. Act is unsustainable in law.

28. Advocate, Shri Shinde replied that alleged misconducts are from September to November 89, whereas the Chargesheet is of 17th May 1989. There is no explanation as to why no action was taken within 6 months after detection of alleged misconduct.

29. It is held in *Municipal Corporation of Greater Bombay V/s The B. E. S. T. Workers Unions reported in 1973-S. C. Cases (L and S) at page 177 (1973 Mah. L. J. at page 473)* that provisions of Section 78 (*1*) (*D*) (*i*) of the B. I. R. Act are not mandetory but are directory. But it is further observed that complaints with the same is necessary. As such, burden lies upon the Bank to show as to why order was passed after a period of six month. Factual finding of learned Labour Court that there is no explanation at all in the written statement about the delay and the delay cannot be condoned in absence of any reason, is well justifiable. There cannot be re-appreciation of evidence while entertaining revision under section 44 of the M. R. T. U. and P. U. L. P. Act, unless the finding is perverse or is not borned out by the record. The Bank has not led any oral evidence. Question of prejudice is of no consequence in view of clear dictum of Hon'ble Apex Court in Municipal Corporation of Greater Bombay's case. I, therefore, find that learned Labour Court has rightly held that punishment of dismissal is hit by Section 78 (*i*) (*D*) (*1*) of the BIR Act. Accordingly, I answer Point No. 3 in the affirmative.

30. Advocate, Shri Chavan then argued that fidelity is the backbone of banking industry. Honety needs to be preserved by every bank employee, otherwise, entire business of the bank gets impared. As such, punishment of dismissal is well justifiable. In support of his arguments, he relied on the decisions of Hon'ble Apex Court in *Union Bank of India V/s Vishwa mohan reported in AIR 1998 Supreme Court at page 2311* and *Disciplinaary Authority cum Regional Manager V/s Nijunja Bihari Patnaik reported in 1996 I CLR at page 951.*

31. Advocate, Shri Shinde replied that there is no dispute about proposition of law laid down by Hon'ble Apex Court in above decisions. However, proved misconduct is negligence only and not like fraud, misappropriation and dis-honesty. Eventually, there is also no question of lossing confidence. Proved misconduct is not so serious to warrant punishment of economic death. On the contrary, considering unblamished service of 18 years, punishment of warning is sufficient. He then submitted that refusal of bank wages is substantial monetary punishment.

32. It is not necessary to reiterate discussions made above regarding disproportionality of the punishment. No doubt, fidelity is the backbone of the banking industry. However, the Complainant has not indulged into fraud, dishonesty or misappropriation. The very fact of remitting misappropriated amount by Shri Hingmire and resigned from service is well indicative of non-involvement of the service is well indicative of non-involvement of the Complainant in the misappropriation. He is found to be negligent only. As such, decisions relied by Advocate, Shri Chavan are of no help Bank. I am respectfully bound by the observations made therein. Considering proved misconduct of negligence only, finding of learned Labour Court that punishment of dismissal is discremination and shockingly disproportionate, is well justifiable. Further finding that refusal of back wages for proved misconducts of negligent will meet the ends of justice, is also justifiable. Accordingly, I answer Point Nos. 4 and 5 in the affirmative.

33. To summarise, learned Labour Court has rightly allowed the complaint partly. There is no perversity or arbitrariness in the impugned judgment. Back wages are rightly deprived for the proved misconducts of negligence considering the fact that the Complainant is serving in a banking industry. There is every substance in its reasoning. As such, no case is made out warranting interference under revisional jurisdiction. Consequently, both revision applications are liable to be dismissed.

34. To conclud, I pass following order :—

Order

(*i*) Both revision applications are dismissed.

(*ii*) A copy of this judgment by kept in other revision application.

(*iii*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 23th September 2002.

Assistant Registrar,
Industrial Court, Kolhapur.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. B. SAWANT, MEMBER

COMPLAINT (ULP) No. 674 OF 2001.—Mr. Ambrose Menezes, 7/A, Bosen Road, Opp. Ronson Bakery, Bandra (West), Mumbai.—*Complainant—Versus*—(1) M/s. Crompton Graves Ltd., Dr. E. Moses Road, Worli, Mumbai-400 018. (2) Senior Works Manager, M/s. Crompton Graves Ltd., Dr. E. Moses Road, Worli, Mumbai-400 018.—*Respondents.*

CORAM.— Shri G. I. Fernandes, Advocate for Complainant.

Shri S. P. Dhulepkar, Advocate for Respondents.

Judgment

1. The Complainant has filed the present complaint against the Respondents M/s. Crompton Graves Ltd., and Senior Works Manager alleging that these Respondents have committed unfair labour practice within the meaning of iteams 3, 5, 9 and 10 of Schedule-IV of the M.R.T.U. and P.U.L.P. Act, 1971. The facts which gave rise to the present litigation can be stated in nutshell as follow.

2. The Complainant asserts that he is a workmen and is doing manual, unskilled, technical etc. work. Though he is designated as Assistant Manager, he is a workmen within the meaning of Section 2(s) of the Industrial Disputes Act. The Respondent is manufacturing electric motors useful in the industrial field. The total number of staff working at Worli is about 187. The Respondent has settled his business and is earning huge profits. The Respondent is leading company in the manufacturing process of electric motors.

3. The Complainant has joined the Company as an Apprentice. He was designated in the year 1973 as Supervisor in the Assembly Department and thereafter from time to time his designation was changed and finally, he is designated as Assistant Manager on 1998-99. Inspite of such designation, the nature of duties performed by the Complainant are the same. He asserts that he has rendered unblemished post in last 33 years.

4. Voluntary Retirement Scheme (V.R.S.) was introduced in the company and the Complainant orally opted for the same but the Respondent denied the same to the Complainant. The Respondent No. 2 called the Complainant in his cabin and gave him threats to submit his resignation with dire consequences of his transfer out of Mumbai in case he fail to submit his resignation and also gave him threat to terminate his service if the resignation has not been given. Immediately on 5th September 2001, the Complainant lodged a complaint to the Worli Police Station pertaining to the threat given to him.

5. It is pointed out that out of 187 staff members, 136 have opted for V.R.S. and the 3 supervisory staff members were transferred from Worli to Kanjurmarg. Besides other 40 staff members were also transferred from Worli to Kanjurmarg. The Complainant submits that there are only 5 years left for his retirement and at the fag-end of his service if he is threatened for transfer out of Mumbai, it will put him most inconvenient causing him heavy hardship. The Complainant has a wife suffering with Hyper Tension and Intestional Lung disease. She is taking a treatment in Bhabha Hospital, Bandra. The Complainant is required to look after his wife and, therefore, is not able to leave Mumbai. Besides the mother-in-law of the Complainant is also residing with him and she is not in a position to move freely. For that count also, he is not able to leave Mumbai. The Complainant asserts that in case of his transfer out of Mumbai, his family is likely to be ruined. The Complainant also accept that in case of his transfer to Kanjurmarg, he has no objection to join the place. The move taken by the Respondent for transferring the Complainant from Worli to some where outside Mumbai is discriminary and *malafide.* Therefore, the Complainant asserts that it is necessary to restrain the Respondent from terminating the services or from transferring him outside Mumbai. Hence, the complaint.

6. The Respondents have resisted the contention by filing the written statement *vide* Exh. C-5 and thereby adopted the contention in the earlier affidavit *vide* Exh. C-2 as the case of the Respondent by pursis reiterating the same. Those are as below.

7. It is first and foremost contention of the Respondent that no unfair labour practice as alleged has every been committed or continued or followed by the Respondents. It is also contention of the Respondent that the Complainant is not a workman within the meaning of Section 2(s) of the Industrial Disputes Act. He was complete incharge of the second shift of Worli factory and was discharging all managerial, administrative and supervisory duties. His otherwise duties are being explained and pointed out that the Complainant was doing all the work which is taking him out of the purview of the term employee. Therefore, the complaint itself is not maintainable.

8. It is also contention that the Division at Worli was engaged in the business of manufacturing of industrial motor. The plant was not economically viable because of cut-throat competition in the open market owing to the Government's globalisation and liberalisation policy. The Respondent is also incurring heavy recurring losses. Therefore, the Respondent has reorganised its business and whereever it was uneconomical, certain units and divisions have been discontinued. The company has also discontinued manufacturing of industrial motors at their factory at Worli, and shifted the operation partly to Goa and Nagar factories. So also the production of fans at Kanjurmarg factory has been discontinued and shifted to Goa. As a result of which, the officers and Manager numbering about 32 from Worli factory have been transferred to Goa and Nagar factories. It was account of business need and accordingly, the Complainant was verbally informed that he will also be transferred to Goa like others which is under challenge.

9. It is the contention of the Respondents that the transfer of the Complainant is based on the business requirement and the work at Worli factory has been completely closed down. It was conveyed to the Complainant that his service condition of transfer will remain unchanged. The Complainant has been promoted from time to time from 1st April 1973 onwards.

10. The Complainant was complete incharge of whole factory function during the second shift. It is pointed out that in appointment letter, there is a transfer clause and the same has been automatically incorporated in the subsequent letters of promotion. It is pointed out that the challenge made by the Complainant without joining on the place of transfer is not maintainable.

11. The contention about V.R.S. is applicable to the employees in workmen category and not for the employees in the categories of officers, Managers. It is, therefore, pointed out that the Complainant has not approached this Court with clean hands. It is pointed out that about 40 workers were transferred to Kanjurmarg on account of non-availability of work at Worli. Therefore, it is submitted that the difficulties and placed cannot be a ground for stalling the transfer order of the Complainant. It is the say of the Respondent that to organise or reorganise the business activities, it is the purgative of the management and on that term, the Complainant cannot dictate.

12. In another affidavit Exh. C-4, the Respondent has affirmed that the Complainant was sanctioning the leave of the workmen working under him and he was the head of the Production Department. It is also pointed out that the Complainant has authority for requisition of materials required for the second shift. The Complainant has authority to issue gate passes. The Inspector of the inspection department was functionally reporting to the Complainant and the Complainant has authority to reject any material inspected by the Inspector. The Complainant has power to recommend the promotion also. Therefore, the Complainant is not a workmen. It is the say of the Respondent that the Respondent has right to transfer the Complainant at any place outside Mumbai. The M-I Division has been shifted from Worli to Goa and, therefore, normal law of transfer is not applicable to the case of the Complainant. In fact, the Complainant is sitting idle without any work since 2001. It is further pointed out that the other Officers are already transferred and they have reported for work outside Mumbai. There is a practice of transferring executives outside Mumbai carrying similar letters of appointment. Only because the Complainant has been transferred to Goa, it cannot be said that the transfer is a *malafide* transfer. The Complainant is drawing salary more Rs. 16,000. Therefore, with this and other grounds, it is submitted that the complaint is liable to be dismissed.

13. On these averments, following issues are framed after recasting the same and I have given my finding on each of the issue as shown against each of them :—

Issues	*Findings*
(1) Whether the Complainant is a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and Sec. 3(5) of the M.R.T.U. and P.U.L.P. Act, 1971 ?	Negative.
(2) Whether the transfer order of the Complainant effected to Goa is *malafide* and under the guise of following management policy ?	Negative.
(3) Does the Complainant prove that the Respondent have followed unfair labour practice under items 3, 5, 9 and 10 of Schedule-IV of the M. R. T. U. and P.U.L.P. Act, 1971 ?	Negative.
(4) Whether the Complainant is entitled for the declaration as prayed for ?	Negative.
(5) To what consequential relief, the Complainant is entitled to ?	No relief.
(6) What order ?	As per final order.

Reasons

14. *Point No. 1.*—The continuous span of service rendered by the Complainant has now reached him to the post of Assistant Production Manager. Natural outcome of such designation is that of doing the work as expected from the post. It is also a natural outcome that the Respondents are negativing the contention of the Complainant that he is a workman. The rival submissions, therefore, required to be looked into by referring to the voluminous documents on record together with oral evidence. Before that it has to be made clear that a post carried by a person employed in the establishment can only be a name-lending but in fact, a person possibly is discharging his duty manually and as a workman. Therefore, it is an approved notion that one should not go as per the designation but the actual work performed by the concerned employee shall be the main criteria to fix such person in a supervisory category or a category of a workman. By cursarary look to the submissions by both the parties, the Complainant obviously is reitereting that he is a workman relying on the actually mode of work he is performing. On the contrary, the Respondent has emphasised that the Complainant was complete incharge of the second shift of Worli factory in which 70 workers and one Officer Shri Pawar and one Supervisor Shri Shukla were working under the Complainant. Therefore, to circumvone the situation, the requirement of law and the facts on record need to be construed throughly and, therefore, reproduction of sub-section (*2*) of Section 2 of the Industrial Disputes Act, 1947 is essential. :—

"Workman means any person ..... but does not include any such person,

(*i*) .....

(*ii*) .....

(*iii*) who is employed mainly in a managerial or administrative capacity, or

(*iv*) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mens or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature".

Referring to these words, sub-clause (*iii*) refers to the word managerial or administrative which leads to the actual nature of performance of duty while Sub-clause (*iv*) to Sub-section (*s*) deals with supervisory nature of work and wages. Therefore, an endeavour is required to revaluate the entire working condition of the employee concerned to formulate him in a particular category.

15. The Complainant in the complaint explained that his duties are manual, unskilled, skilled, technical, operational and clerical or supervisory in nature. Though the Complainant has joined as an Apprentice in 1968 and though he has been promoted from time to time according to the Complainant, there is no change in his duties which he was rendering in the year 1968 till the date. The employees working at Worli factory are said to be working under the Complainant and, therefore, the Complainant in his evidence Exh. 18 has categorically pointed out that in Assembly Department, there are 18 people. There was no officer working in the said department. Out of 18, two were Pressmen, Two Machine Operators, 4 Helpers and two Terminal Box Fitters and 8 Assemblers. The names of Shri Pawar and Shri Shukla as much been relied by the Respondents as are said to be working in the Packing Department and Inspection Department, respectively. At this juncture, it has to be pointed out that the Complainant has worked in the Assembly Department for about 20 years. He is pointing out the persons who were working in the Assembly Department, were obviously below the designation of Assistant Manager. Therefore, in my view, even on the basis of respective designation, is can be said that the Complainant has a superior role over the work of all those persons.

16. The nature of duties, therefore, as explained by the Complainant is in the negative form saying that he was not doing the work which the Respondents have specifically averred or mentioned in the affidavit in reply or in the evidence. It is, therefore, required to be reckoned that whatever work alleged to have been done by the Complainant is whether as a continuous flow of work or was done intermittently. The incidental work if any done by the Complainant which will admittedly, not bind the Complainant totaling the entire process of his status and the actual performance of work. In other words, each of the activities which are being done by the Complainant will have to be tested to find out whether the said activity was in the form of managerial or administrative capacity or it was a part of his day to day duties as of an ordinary workman.

17. It is pointed out that the Complainant has authority to sign the excise papers on behalf of the company. To substantiate this contention, the Respondent has produced a letter correspondence addressed to the Commissioner of Excise by which the name of the Complainant is seen in the list of authorised signatory. The excise challans are on record at Exh. C-31 (Colly.) showing that the Complainant was signing on the challans under the authority. As against this, the Complainant has produced along with Exh. U-21, 17 challans. The excise challan at Exh. U-48 (Colly.) from page Nos. 57 to 65, and the challan at Exh. U-47 does not bear the signature of the Complainant as authorised signatory. Therefore, these excise challans though reflect the names of others as authorised signatory, the question remains as to whether when their names are also included in the list of authorised signatory and forwarded to the requisite authority under the Central Excise Act, then such challans whether will suffice the purpose of the Complainant. This question has to be answered in the negative. The fact which required to be reckoned is that the Complainant was signing the excise challans as authorised signatory. There is no question of signing the excise challans by others otherwise than the Complainant and there is no dispute also about the authority of those persons to sign the excise challans. In the event, it has to be considered under what circumstances, the Complainant has signed on the excise challans and whether by signing the excise challans, it will take the Complainant out of the purview of the term workman ?

18. The evidence of the Complainant *vide* Exh. 18 puts some light on the aspects raised above. He has mentioned in para 3 page 3 that he had no authority to sign on excise papers. The explanation about his signatures appearing on the excise papers produced with Exh. C-4 page No. 8 expressed his lack of knowledge so far as inclusion of his name in the list of authorised signatories dated 28th September 1993. Besides the Complainant has accepted that the list of authorised persons has been updated and excepting Shri U. J. Nayak, the others have already left the service of the company. On this explanation, it appears that the Complainant is intending to shrink the responsibility about signing on excise papers. It is evident that for signing on excise papers, the authority is essential. The Complainant has rendered about 33 years service continuously at Worli, barring one instance. Therefore, it can assume that the Complainant was well aware about the authority required for signing the excise papers. Admittedly, the others are also there from the other departments who ware also given an authority to sign on the excise papers. Therefore the instance of 31st May 2001, occurred at 22.45 p.m. has been explained by the Complainant that there was no one who can be called and contacted for signature. The necessity for calling somebody was on account of 7 number of excess electric motors found in the truck. The Complainant himself admits that since the truck was required to be sent out, he himself has taken a decision to sign on the challan. This particular aspect shall go to the root of the matter, inspite of the fact that about 109 challans were signed by others. The Complainant also admits his signature on page No. 34 to 36 with Exh. C-3 which are the excise challans and reiterates that excepting these challans, he has not signed any excise challans during his tenure in the Assembly Department. In the above situation, the normal conclusion is to see the authority of a person to sign on excise challans. The Complainant is signing on the excise challans and still affirms that he is a workman, then the question may arise as to why the Complainant was required to sign and not other workmen ? This question itself reflects that by virtue of seniority in the department and by virtue of authority placed in him by the Respondent company, he has signed on the excise challans. How merely signing on excise challans, whether he becomes a man with an administrative capacity or control was the any situation are not, will have to be tested on the basis of the other instances as being quoted and relied on by the Respondent *viz.* requisition of material, sanction of leave, recommendation of promotion etc.

19. Learned Advocate Shri Fernandes for the Complainant has relied on the observation of Hon'ble Apex Court in a case of *Sharad Kumar* V/s. *Government of FCT of Delhi 2002 (100)-FJR-852 Supreme Court.* Hon'ble Apex Court has ruled that :—

> " It has to be taken as an accepted principle that in order to come within the meaning of expression "workman" in Section 2(s), the person has to be discharging any one of the types of the work enumerated in the first portion of Section. If the person does not come within the first portion of Section, then it is not necessary to consider the further question whether he comes within any of the classes of the workmen excluded under the later part of Section. If the nature of duties discharged by the employee is multifarious, then further question that may arise for consideration is which of them is his principle duty and which are the anciliary duties performed by him. "

Being in careful obidance with the principle laid down by Hon'ble Their Lordships the role of this Court, therefore, will have to ascertain the main duties of the Complainant and the anciliary or incidental duties performed by the Complainant. This point has arisen because the Complainant has emphasised much on the point that signing on excise challans is not his regular or main duty. The Complainant has pointed out in para 3 that initially, he has worked in Machine Shop, in Steel Section. Thereafter, he worked in Assembly Section for 20 years and is doing the same work which he was doing 20 years back. The Pressmen, Machine Operators, Helpers, Terminal Box Fitters, Assemblers were and are working in the Assembly department. The Complainant has specifically pointed out that there was no supervisor and officer working in the Assembly department. The specifications of machines placed in the Assembly department have been explained by the Complainant and pointed out that whenever he used to sit on one machine, the other machine used to remain shut as the machines are computer operated and

required high skill. The Complainant used to keep on setting all these machines one by one and within time, job fitted in the machine used to come out. According to the Complainant, he has no authority to fix the day to day output from the machines and the same part was performed by the Production Manager Shri Hegde. The Inspection Department was doing the work of checking the output of 18 employees. The other part of the evidence of the Complainant discloses the negative form of the Respondent. The substance of the evidence led by the Complainant can be brought into a narrow campus. By saying that the Complainant is still reiterating that what work he was doing is still subsisting and same nature of work he has continued for last more than 20 years. Obviously, the initial appointment of the Complainant was not in the supervisory cadre. Therefore, even when the matter has been brought to the Court, the Complainant reiterates that he is not a supervisor nor doing any administrative work. This particular part, therefore, can be well visualised by looking into the documents produced along with Exh. C-3. Sr. No. 1 to Exh. C-24 is a review of remuneration by which the basic salary of the Complainant is Rs. 7,480 per month in the year 1999 and the designation is shown as Assistant Production Manager. There are other review remunerations Exh. C-25 to Exh. C-27 for the years 1995, 1996 and 1997. The outcome of those documents is that the Complainant's designation and he is drawing wages more than Rs. 1,600.

20. The another aspect of the matter is that of the Personal Appraisal Form. The Form Exh. C-39 has been filled in by the Respondent which discloses that the form applies to the officer only. The designation of the Complainant is shown as Senior Production Executive in the Grade C-I. The other entries in the requisite proforma is being made by the Respondent considering the performance of the Complainant and we have nothing to do with it at the present moment. The documents at Exh. C-21 to Exh. C-23 and Exh. C-16 (Colly.) are the review remuneration wherein the designation and grade of the Complainant is mentioned. The information made available by the Respondent about the salary, designation etc. is right from the inception of the Complainant with the Respondent Company. Admittedly, the figures of wages are also low but those were the rates at that time. Now-a-days, a settled principle that while considering the status of an employee as a workman, his position, wage-scales etc. is to be seen on the date when the complaint is filed or the issue is raised and not on the date when the Complainant has entered in the service of the Respondent.

21. Hon'ble His Lordship of our High Court in a case of *Everest Advertising Pvt. Ltd.* V/s. *Pratik C. Khandhadiva and others, 1999 LLR-669* has observed that whatever be the nature of character of employment prior to the date of termination of service. It is the character of employment as on the date of termination of service that determined the jurisdiction of the Tribunal as decided by the Tribunal. By this rule, the wages drawn by the Complainant on the work performed by the Complainant with the designation and grade shall only play a prominent role and not the earlier designation or work at the time of inception in the service will be relevant.

22. Coming back to the earlier proposition regarding the excise challans etc. are concerned, the Complainant was given inspection of the documents and he as submitted the inspection report *vide* Exh. U-19. It is pointed out by the Complainant that all the relevant documents are not being put up before the Complainant for inspection for the period called for. The challans for the period in between 4th September 2001 to 5th February 2002 were only put up wherein the Complainant nowhere has signed as authorised signatory. So far as excise invoice challans are concerned, I have already pointed out that the fact that the Complainant has signed on those challans is important and not that the other employees have also signed on the said challans.

23. The Complainant has referred to the leave applications, recommendation of promotions and individual leave application cards in his inspection report. These documents obviously referred to the authority of a person for sanctioning of leave, recommending the promotion etc. In view of this proposition, if any signature appears on the leave application or recommendation, it will definitely affirm the administrative control or supervisory role of the person signing on the leave application etc. In a case of *Union Carbide (India) Ltd.* V/s. *D. Samuel and Others 1998-II-CLR-736,* Hon'ble His Lordship by referring to the definition of a workman under Section

2(*s*) as amended from time to time, has observed that the definition would show that the person working in the supervisory capacity, are to be excluded, from the definition of workman, must be either doing work of supervisory capacity and drawing wages exceeding Rs. 1,600 now and then Rs. 1,500 for such supervisor without the question of salary being considered must by nature of duties attached to his office or by reasons or powers vested on him preformed duties mainly of a managerial nature. In other words, if the supervisor is entrusted with mainly managerial function, then irrespective of the facts as to what are the wages. He will also be encluded from the definition of a workman. While giving the rule, Hon'ble His Lordship her referred to the observation of Hon'ble Apex Court. In a case of *AIR 1994 Supreme Court-153* wherein Hon'ble Apex Court has laid down a principle that :—

"One must look into the main work and that must be found out from the main duties. A supervisor was one who could bind the company to take some kind of decision on behalf of the company. One who was reporting merely as to the affairs of the company and making assessment for the purpose of reporting was not a supervisor."

On the basis of the above said rule, Hon'ble His Lordship has considered the test to come to proper conclusion to determine as to whether a person is a workman or supervisor. Those are required to be reproduced here also and also to consider to come to a proper conclusion :—

(1) Designation is not material but what is important is nature of work.

(2) To find out dominent purpose of employment and not additional duties the employee may be performing.

(3) Can he mind the employer to some kind of decisions on behalf of employer/company.

(4) Has the employee power to direct or oversee the work of his subordinates.

(5) Has he power to recommend or sanction leave.

(6) Has he power to take disciplinary action against workman or to terminate their services.

Hon'ble His Lordship has further laid down additional tests as follows :—

(*a*) Whether the employee can examine quality of work and whether it is performed satisfactorily.

(*b*) Whether he has power to assign duties.

(*c*) Can he indent material and distribute amongst workmen.

(*d*) Are there persons working under him.

(*e*) Has he power to supervise work of men and not merely machines.

(*f*) Whether employee marks attendance of other workman.

(*g*) Whether he writ confidential reports of his subordinates.

24. Having regard to the above principles and tests on record, I have referred to the oral evidence on record. Annexure 'C' with the rejoinder Exh. C-4 Exh. C-36 (Colly) page Nos. 12 to 24 are the Material Scrap Generation Records, for the years 1991 and 1992 and Exh. C-37 (Colly) page No. 28 to 32 for the year 1988 as a Material Scrap Note. There are columns about the description, quality of scrap material, reasons for scrapping. It has column of signature of section incharge, departmental head, Inspector and security. The details of the material scrap record is signed by the Complainant, as departmental head. On such facts, the submissions of the Complainant that he has signed in the capacity of a Clerk only is not supported with any cogent material on record. Besides the Complainant has not pointed out that who was the departmental head *i.e.* who should have signed in the said column. Thirdly, the submissions of the Complainant that the material was already inspected by the Inspector and, therefore, he has no independent authority to order the scrap of the material. Pursuant to this submission, what finds important in this respect is that the Complainant's signing on the material scrap

record in the capacity of a departmental head. The surrounding fact reflects that the Complainant was working continuously in the night shift. There were 70 workmen as narrated earlier. They were dealing with the machines and the Complainant being the Assistant Production Manager, was the senior most in grade and designation from them. In this situation, the contention of the Complainant of the Complainant about the authority to scrap the material is of no avail.

25. The Complainant tried to avoide the responsibility of his signing as departmental head by pointing out that one Shri Hatiya was busy in meeting and, therefore, he asked the Complainant to confirm weight only. After confirming the same, the Complainant signed on the said scrap note for Shri Hatiya. It is pertinent to note that there is no endorsement on any of the material scrap generation record at Exh. C-36 of Exh. C-37 that the Complainant has signed on behalf of Shri Hatiya. At page No. 25 Exh. C-37, the Complainant has signed under the head of Superintendent. There also no where, he has mentioned that he has signed for Shri Hatiya. The supervision over the scrap material, therefore, visualises from such scrap notes the quantity, reasons for scrapping etc. points the person who signed on some much note. Therefore, the person who signs on such note is responsible for all the contents in the said scrap note. Having regard to this fact, it has to be assumed that the Complainant was considered as responsible person from the Assembly Department for verifying and supervising the process of scrap material.

26. The C-9, Annexure 'D' of the leave cards from the Motor Assembly Department. There are several columns to be entered in the leave cards. Under the head of signature, there are 4 columns in which the signature of the employee, Sectional Supervisor, Departmental Head and Time Officer are to be entered into. On a cursaraery look to the leave cards on page Nos. 33 to 42, there are signatures of the Complainant in the column of Sectional Supervisor. It is pertinent to note that on those leave cards, on some occasions, the Complainant has signed in both the columns of Sectional Supervisor and Departmental Head. Therefore, the Complainant's performance of duty has to be assumed that those were supervisory nature as well as the Complainant was abrogatting the powers of the departmental head.

27. On the basis of the documentary evidence, the Complainant in para 7 admits that he has signed on the leave cards. But explained that his signature only to ascertain whether the entries in the card are properly filled in from the punching clock. I surprise to note that the Complainant being in the employment for more than 25 years and reached to the higher post, cannot be said who have signed on the official document blindly. Once he has signed by knowing it full well that he has signed in the column of departmental head, naturally the responsibility has to be on his shoulder and he cannot avoid the same by simply saying that he has no authority to sign the same card. Earlier to that, the Complainant has accepted that the employee has to sign on the leave cards and then, the departmental head has to sign on it as considered a leave and for granting the same. This fact itself indicates that the Complainant's signing on the leave card under the head of departmental head itself presumes that the Complainant was signing the leave cards by sanctioning the leave as a departmental head. Same thing has occured so far as the leave application Sr. Nos. 31 with Exh. C-3 pertaining to the leave of Shri V. G. Pawar of Packing Department.

28. The Complainant is relying on the format of the leave application produced along with Exh. U-20. The production of the documents by order of this Court was not allowed as the proper custody was not being establishment but since the format has referred to, I have to point out that the application requires signature of person who considers and grants the leave. Besides this, leave application with Exh. U-21 are 45 in numbers are produced by the Complainant which at some places are signed by the Complainant, in the same column as Supervisor and Departmental Head. Considering these 45 leave applications, it has to be borne in mind that though most of the applications do not bear the signatures of the Complainant, the earlier applications referred to and the application dated 2nd February, 1975 of Shri Ramkripal Sadhu, an employee bears the signature of the Complainant. This aspect has to be looked into from the point of predominant nature of duties of the Complainant. The Complainant though was working as Assistant Production Manager and his predominent duty must be related with the production in the Motor Assembly Department, the fact remains about administration or supervision over the workers in the said department. Obtaining a leave is one of the said aspect. Therefore, the Complainant's signing on the leave cards though intermitantly shall definitely attribute the duties of the Complainant.

29. Another aspect of the matter is that the employer will not authorise any ley-men to sign on the leave card. The person who is having a standing in the establishment his seniority and the responsibility placed in him, shall make him to sign on the leave cards. The company will definitely not instruct any otherwise person to sign on the leave cards nor the time office will reckone the authorisation of leave on a particular employee if the leave card is being signed by a person having no authority. Therefore, in any case, though the main duties of the Complainant is to maintain the production, the anciliary part of signing the material scrap note or leave card shall definitely have a concern with the predominent duties of the Complainant. For coming to the said conclusion, I have referred to the observations Hon'ble Delhi High Court in a case of *G. L. Pawha* V/s. *New India Assurance Company Ltd., 2000-II-CLR-669* and Hon'ble Madras High Court in case of *R. Devanath* V/s. *Presiding Officer 2000 (4) LLN-234.*

30. Learned Advocate Shri Fernandes has relied on the observations of Hon'ble Supreme Court in a case of Civil Appeal No. 2638 of 1980 dated 6th May 1985 which refers to the primary and basic duties and additional duties cannot change the character and status of the person. The predominent purpose of employment should be the determining factor. The employee in the above referred case though was working as Assistant, was looking after the work of other two members of groupand to ensure that the work attached to the group is completed in time. During the said process, the employee was preparing Bank Reconciliation statement and other administrative work like indent etc. In para 12, it is ruled that the Clerks and Assistants could hardly be elevated to the rank of officer of being dominated contractual staff cadre. This high sounding nomenclature adopted not only to observe the age of the employer but preliminary for avoiding the application of the Industrial Disputes Act. On these set of facts and referring to the fact matrix of the case in hand, the test if applied for pointing out the primary, basic or dominant nature of duties of the Complainant, it is clear that the Complainant was taken into a managerial cadre. His salary is much higher than Rs. 1,600 and, therefore, he is signing on the leave cards or material scrap note as Superintendent or Departmental head was approved and, therefore, so far as his own department is concerned, the duties as performed by the Complainant were primarily and basic duties even of signing the leave application.

31. Hon'ble Caluctta High Court in a case of *Assembly of God Hospital and Research Centre* V/s. *First Industrial Tribunal, West Bengal, 2002 (100)-FJR-769* has laid down that :—

> "It is not possible to lay down a strait jacket formula whether an employee is a workmen or not. In the complexity of industrial or commercial organisations, quite a large number of employees are often required to do more than one kind of work. The designation of an employee is not of much importance. What is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the concerned employees. If the main work of the employee is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidently or only a small fraction of working time is devoted to some supervisory work, the employee will come under the definition of "Workman" under Section 2(s) of the Industrial Disputes Act, 1947."

The above said guidelines are being considered in view of test laid down by Hon'ble Apex Court as referred above and I again refer to the evidence of record. The Complainant has pointed out that his designation as Assistant Production Manager has been incorrectly shown without giving normal increment nor by giving any letter of promotion. I have referred to the letters along with Exh. C-3 which has a heading of review of remuneration which includes the designation of the Complainant. These are already being pointed out earlier but from the point of view of the Complainant, it has to be born in mind that the periodically raised wages of the Complainant and there are letters to that effect. The wage-rise of oneself shall definitely make a person aware of his position and status and, therefore, merely the Complainant has not signed on these letters, will not be disentitled him to claim the benefits which are accured to

the post of Assistant Production Manager or Senior Production Executive etc. The performance rating and other documents on record are the indicative fact of Complainant's knowledge of his designation and status. Besides the appraisal reports indicates that :—

(1) The Complainant was shift incharge for production to meet daily targets. The duties as specified in the column of the appraisal reports which are mentioned as main areas of the job for which the employee is personally accountable.

(2) Therefore, the duties which are main in nature are also of maintaining discipline for smooth operation in the shop.

(3) The production norms line wise to achieve productivity.

(4) At times bearing of indent metrorate meet divisional commitments.

(5) To support other shifts for smooth operation.

The self appraisal column also reflects on page No. 29 on quality improvement by reducing the reduction of line. Learned Advocate Shri Fernandes has vehemently objected to consider this approisal form. According to him, the entries therein are not made by the Complainant. The Complainant's signature is only obtained and that the contents therein are not being admitted. In my view, though the contents are not in the handwriting of the Complainant, the signing of appresial form carries on impression that the employee accepts whatever being mentioned in the appraisal form. Secondly, there is no specific denial about the duties as specified as main area of duties on page No. 26. Therefore, also the duties as envisaged are to be read in consonance with the act of signing the leave cards and material scrap note. Those instance of signing on such documents is, therefore, specifically indicates the potentiality of the Complainant to work in the capacity. The original form of Performance Appraisal 2001 Exh. C-47, therefore, was brought before the Court to ascertain whether the entries therein are within the knowledge of the Complainant. The Complainant has not written the contents therein by himself though the formats specifies that the duties performed by him. Therefore, the documents as produced by the company cannot be treated as conclusive proof but can be used for the co-lateral purpose only.

32. The Complainant in his evidence has specified that he has no authority to pass or sanction any overtime to the employees. He has no authority to appoint or transfer any of the employees nor he has any authority to take any disciplinary action. He has relief on the documents Exh. U-20 Sr. No. 1 which is intercom telephone directory. The names of the departmental heads are denomiated there. However, the Complainant was working in the Motor Assembly Department and the name of the said Assembly Department is not there. This may be the reason for not mentioning the initials of the Complainant. The employee has not been explained by the Complainant also. The Complainant further reiterates that he has never attended the meeting of departmental head nor he was invited any time for the meeting. This particular aspect has not been retalisted by the Respondent company by any cogent evidence. Therefore, the fact that the Complainant was not appointing authority or the authority to effect disciplinary action or dismissal has remained as it is.

33. It is further pointed out by the Complainant that the daily production is as per the instructions of the departmental head. The departmental head used to write instructions on the black board near the machine and the Complainant and others were following the same. This particular aspect indicates that the Complainant was not giving any instructions so far as production is concerned. It is pertinent to note that the Complainant has denied that be is senior most amongst the employees in the night shifts and also that the employees working in the night shift were directly working under the supervision and control of the Complainant. He has denied the suggestion that he was assigning the work to the employees and was getting the work done. The question pertaining to the gate passes are concerned, admittedly, those bear signatures of the Complainant. Those are at Exh. C-39 which are along with Exh. C-4. The contention of the Complainant that those gate passes were signed by him as per the instructions as well as he asserts that his signature is appearing only because of identifying the person and

ticket number. It is his contention that the other part of the gate passes always bears the signature of the Personnel Officer allowing the person to go out of the office. In the oral evidence, the signatures of the Complainant though admitted, he asserts that he has no knowledge as to whether the employee was allowed to go out of the factory premises on the basis of such passes. It is strange to note that though the gate pass was signed by the Complainant, he does not know whether it is a on duty gate pass or so.

34. So far as promotional aspect is concerned, the documents Exh. C-34 are produced which annexed to Exh. C-4. The form bears the signature of the Complainant under the head of "proposed by". The proposal of giving promotions, therefore, has to be assumed by the Complainant. The contentions of the Complainant in this regard are the person who is proposing the promotion of an employee has reason to believe the capacity and potentiality of the employee. Unless that potentiality has been assessed, it becomes very difficult to propose such promotions. Therefore, the signatures of the Complainant proposing the promotion of the employees from the Assembly department has some base though there is no recommendation for giving him promotion signed by the Complainant.

35. On the above overall scrutiny of the oral and documentary evidence on record, following prominent aspects have emerged :—

(1) The Complainant was designated as Assistant Production Manager.

(2) He was signing the leave cards as a Supervisor or in the column of departmental head.

(3) He was signing the gate passes.

(4) He was proposing the promotions of the employees.

(5) He was signing on the material scrap note.

Now, it has to be ascertained as to whether the transpired facts out of the evidence will be amounting to performing the duty in a supervisory or administrative capacity or not.

36. The evidence on behalf of the Respondent Shri U. J. Nayak who is Senior Manager-Training. The Complainant was working with him in the same division at Worli. The promotional herisons which were made available to the Complainant has been explained by Shri Nayak and pointed out that in the year 1999, the Complainant was promoted to the post of Assistant Production Manager. If the letter dated 17th August 1999, Exh. C-24 will be seen minutely, it will reflect that the letter does not sound as it is a letter of promotion but it is only a revision in the remuneration. Even if it is construed as a promotional letter, than in such line "other perquisites and conditions of service applicable to your grade remain unchanged." It shows that what the Complainant was getting prior to issuing of a letter Exh. C-24 to him, shall remain as it is. The earlier letters of Exh. C-25, Exh. C-26 and Exh. C-27 are also sounding the same but does not reflect in any way that the Complainant has been promoted to a particular post. The appraisal report Exh. C-47 discloses on page No. 32 in the column of Reviewer's comments that the Complainant is a "good Foreman". This reflects that the Complainant was doing the job of a Foreman. I have also referred to other columns in Exh. C-47 *i. e.* page No. 31 wherein appraisal's comments discloses :—

(1) Stop doing by oneself the things that has to be done by operators.

(2) Continue doing the role of motivator and guide to enhance productivity.

(3) Play more of a managerial role.

These things fairly disclose that the appraisal was required to instruct the Complainant to do a managerial role and not of a manual workers. The apprisal was required to give instructions to stop doing any manual work which is expected from the Operator. Therefore, in short, the document reflects that the Complainant is doing the job of a foreman but was doing a manual work, and, therefore, the instructions were given to him accordingly. This fact in my view carries much weight while assessing the status of the Complainant.

37. Shri Nayak has further pointed out the 7 grades in the company and that the Complainant is getting the monetary benefits available to the Assistant Manager. The Complainant was responsible for the quality of product and was taking the decision and that 70 workmen in the second shift were under the Complainant. Referring to this submission, I have found that no documentary evidence to show that the Complainant was taking decision about the quality control. There is no evidence that the Complainant was attending meetings of the Managers for fixing the quality norms and that there is no oral evidence of the Inspectors who according to Shri Nayak approached the Complainant in case of difficulties.

38. Exh. C-28 is a leave card of Shri V. G. Pawar it is a paper leave sanctioned to Shri Pawar because Shri Pawar has actually worked and then only availed the leave. The remark column of the leave card is not filled in. Therefore, there remains only a signature of the Complainant but the entries in the card will not disclose that the leave of Shri Pawar was sanction. Besides no sanction order is produced on record along with leave application of Shri Pawar. The Deodhar who has carried out the appraisal of the Complainant has not been examined by the Respondent. His evidence was also essential because the remarks in the appraisal form are reviewed after due mutual discussion. Shri Nayak has admitted in cross examination in para 14 that once Shri Chainani was incharge of production planning department and control at Worli. He was entrusted with the work of production budget, daily production planning. Besides Shri Deodhar was material incharge and was discharging his duties as entrusted to him including the raw material components required for the manufacturing of the electric motors. This future aspect, therefore, clarifies that Shri Chainani or Shri Deodhar have been kept back and in their absence, it has been emphasised that the Complainant was responsible for day to day planning of manufacturing process and for requisitioning the material.

39. So far as requisition is concerned, surprisingly, Shri Nayak has admitted that the Complainant used to requisition the material required for production of motors which includes warnish, fuel, paint etc. and was also indenting the materials *i. e.* seator body, roater, sharp bars, nutbolts etc. He has assured that he can produce the material showing that the Complainant was requisitioning of indenting the material from the stores. Unfortunately, no such documents is coming forth before the Court through the Respondents. The documents which are relied on by the Respondent is nothing but requisition slip calling for the mulmul cloth by the Complainant. The mulmul cloth required for each workers to cover the face to avoid going spray in their mouth. Excepting the requisition, of mulmul cloth, there is no whisper on record to substantiate the contention that the Complainant was requisitioning the material parts or articles for the purpose of manufacturing the electric motors.

40. It is pertinent to note that Shri Nayak though expressed about the reimbursement of L. T. expenses and medical expenses and applicable commission with bonus is declared but no document is produced to substantiate the same, *vis-a-vis* the acceptance of the witness that the Complainant was not paid any car allowance, petrol allowance, house furnishing allowance, telephone bills, housing loan etc. The admission that these allowances are available to the Managers shall definitely go to the root of the case. In para 18 of the cross examination, Shri Nayak has admitted that there are no written instructions given to the Complainant that he has to perform supervisory, managerial and administrative role. Further more, in his absence, Shri Pawar was looking after the work but Shri Pawar was never consulting the Complainant but he was consulting on phone to Shri Hegade who was departmental head. Shri Nayak has further admitted that the instructions to the Complainant about his being incharge of entire second shift were verbal.

41. It is pertinent to note that Shri Pawar is still in service of the Respondent. It is the contention in the cross examination that the company was adopting the procedure to prepare daily production plan. However, none of such plans are produced on record. Shri Nayak is also not aware who used to sign the plan nor he is aware of any instructions about reaching the daily production target of the Complainant.

42. In para 22 of the cross examination of Shri Nayak page No. 19, he has again admitted that there were no written instructions by the company that all the decisions will be made by the Complainant and that the Complainant shall be totally incharge of the quality of the product. Besides there were no instructions that the Complainant shall take appropriate decision regarding damage and defective productions. All these admissions indicate that whatever submissions advanced by the Respondent about the managerial duties performed by the Complainant was based on verbal instructions and mutual understanding. It is very pertinent to note that the establishment like the Respondent has not maintained the proper record to substantiate the averments regarding so called managerial responsibility of the Complainant.

43. Exh. C-30 is a letter addressed to the Collector of Central Excise. Shri Nayak has admitted that specimen signatures of the persons named in the letter as will as covering letter of the Managing Director are not produced. Besides that he has expressed that he is not aware about the validity of the said authority. It is very pertinent to note that some of the challans are signed by Shri Vazirani and Shri Sawant whose name are not mentioned in the letter Exh. C-30. Such anomalous situation has not been properly explained by Shri Nayak and, therefore, the letter Exh. C-30 authorising the Complainant to sign the excise challans also raises the eye-brows. Besides the above said situation, Shri Nayak expressed his inability to substantiate his earlier contention that the Complainant was imparting training to the persons. Shri Nayak has also not able to explain the document at page No. 32 of Exh. C-4 pertaining to the training.

44. The proposal, for promotion has much been agitated by both the sides. The Complainant has proposed but not recommended. Therefore, the word "propose" as explained in Concise offered Dictionary as "to pur forward for consideration, nominate a person as member of the society etc". While the word "recommend" is explained as "speak or write of, or suggest as fit for employment or favour or trial for post, promotion, decoration". It is also in the form of "advice-cum-course of action or treatment, person to do that thing should be done". The distinction in between the two words, therefore, clearly postulates that the word "recommend" carries more importance than "propose". By recommending, a positive action is expected while proposal is only to put up before to enable the appropriate person to take a decision for recommending the person for employment or promotion which reflects a positive action on the part of the person who recommands it. Therefore, obviously, the person who recommendation promotion is of higher important than the person who propose for the promotion. By these conclusions derived by me on the basis of the meaning of the words and evidence on record shall go to the root of the matter.

45. On the above scrutiny of oral evidence before the Court, the submissions on behalf of the Respondent, therefore, have to be answered that :—

(1) There is no document that the Complainant was complete incharge of second shift of the Worli factory.

(2) The Complainant has signed on the excise challans but intermitantly and in an exceptional circumstances.

(3) The Complainant never has requisitioned the actual material but has only requisitioned mulmul cloth.

(4) There is no document expressly showing that the leave of any of the employee has been sanctioned by the Complainant.

(5) The Complainant has signed the gate passes and purported part of the gate pass, according to Shri Nayak, which remained with the concerned persons also bears the same signature.

(6) There is no document that the Complainant was allocating the work to officers or workers.

(7) There is no document that the Complainant has authority to reject any defective material.

(8) There is no document showing that the Complainant has recommended any disciplinary action against any of the employee.

(9) There is no document that the Complainant was recommending the promotions. However, the available document re-flects that only proposals were given.

Whatever submissions advanced by the Respondents are mainly based on the performance apparels report. I have already taken care of all the contents therein and has observed that the same has not been filled in by the Complainant in his hand writing. It can be used only for co-lateral purpose and accordingly, it has been used in my earlier discussion.

46. In a case of *H. R. Advanthava* V/s. *Bandos (I) Ltd. 1994-II-CLR-552 Supreme Court,* Hon'ble Apex Court has held that a person to be a workman under the Act must be employed to do the work of any other category *viz.* manual unskilled, skilled, technical, operational, clerical or supervisory and it is not enough that he is not covered by either of the four exceptions to the definition. With careful abidance with the rule by the Hon'ble Apex Court, I have found in the earlier elaborate discussion of facts and scrutiny of documents that the Complainant though was designated as Assistant Production Manager, his designation was name-lender only. He is doing certain acts intermitantly will not take him out of the purview of the term "workman".

47. *Point No. 2.*—Admittedly, the complaint was filed on apprehension of the transfer of the Complainant. It is averred in the pleadings that the Respondents possibly may transfer the Complainant out of Mumbai. The transfer order has been issued after the order of the Hon'ble High Court and by which he has been transferred to Goa. The Complainant has put up his grievance that he has rendered 33 years service in Mumbai. He is at the fag and of his carrier. He has calling mother-in-law residing with him. Therefore, by such personal difficulty of his himself, his wife who is suffering with Intestanal Lung diseases and taking treatment at Bhabha Hospital, the Complainant finds difficult to join at the place where he has been transferred. The second aspect of such transfer order is that of the *malafide* sense on the part of the Respondent and thirdly that the most of the persons are transferred to Kanjurmag, but the Complainant is proposed to be transferred to Goa. On these set of allegations, the Complainant has resisted the submission. Item 3 of Schedule-IV lays down the general unfair labour practice on the part of the employer in case when the employee is transferred *malafide* from one place to another under the guise of following management policy. Item 3 is spread in two parts. The first part is lending to the *malafide* in the mind and action of the employer and second part is the action of the employer under the guise of management policy.

48. The circumstances under which the transfer order of the Complainant came to be issued are explained by Shri Nayak in his evidence para 8 that in the month of August/September, 2001, the operations in the Worli establishment stand discontinued as Worli is making heavy losses for last 3 to 4 years. The operations of Worli were shifted to Goa and Nagar from time to time. It is pointed out that all the workmen category of Worli opted for V.R.S. barring 49 employees and they were transferred to Kanjurmarg. However, the Manager who were working at Worli were transferred either to Goa or Nagar. It is pointed out that 12 officers who were transferred to Goa and 15 to Nagar, have reported to the place of transfer. The list of the transfer is produced at Exh. C-42. It is emphasised that the services of the Complainant were transferred on business count. On this back ground, letus ascertain as to how the Complainant can say that his transfer is *malafide* and also under the guise of management policy. It is the basic contention of the Complainant that he is from workman category and he has not been offered V.R.S. and when he sought for the same, he was threatened to transfer out of Mumbai. The Complainant further points out that the employees who did not opt for V.R.S. were transferred to Kanjurmarg but they are not trasnferred out side Mumbai. The Complainant has also relied on the complaint lodged by him against Shri Nayak for giving him threats of transfer which is at Exh. U-22. It is apparently clear from these submissions that the Complainant is treating his transfer as if the Respondent company is intending to take a revange against him and secondly that inspite of rendering a continuous service, he has been transferred at longer distance at Goa and not at Kanjurmarg. It is, therefore, necessary to see what is the principle laid down by Hon'ble High Court and Hon'ble Apex Court so far as the transfers are concerned. In a case of *Executive Engineer, Mechanical Division, Ahmednagar and other* V/s. *Madhav Narhari Walake and another, 1997-II-LLJ-1068.* Hon'ble his Lordship has observed that the Complainant has to first allege that he has been transferred *malafide* from one place to another

and prove the allegations by cogent evidence. The transfer is a normal incident of transferable service and as long as it is not shown to the contrary to rules of *malafide,* it is impermissible for the Industrial Court to interfere under item 3 of Schedule IV. In view of this observation, the evidence on record squarely lays down that the Complainant has excepting his word no where established about the *malafide* in the minds of the Respondent company. The establishment at Worli and Kanjurmarg, Nagar and Goa were within the knowledge of the Complainant and the instance of transferring the Managers also to Nagar or to Goa as seen from Exh. C-42 is an indicative fact of the transfers interse in accordance with the exigencies of work. There is no other evidence of any other witnesses for the Complainant to come to a conclusion of *malafide* sense in the transfer. Hon'ble Gujrath High Court in a case of *Jayantilal P. Panchal* V/s. *Commissioner of Motor Transport, 1997-LLR-918* has gone one step ahead and ruled that :—

"Transfer of an employee from one place to another is an incident of service-cannot be stalled due to personal difficulties of an employee."

Referring to the observation, the further difficulties of as put up by the Complainant are the sickness of his mother-in-law and wife. At the outset, the Complainant has not produced a single paper to show that his mother-in-law is living with him. Even if the fact is accepted, there is no medical evidence showing that his mother-in-law is sick and is not able to move freely. There is also no evidence from medical point of view that the wife of the Complainant is suffering with lung disease and she is seriously ill. Therefore, the question pertaining to such illness and education of his children is not being established with any cogent evidence. Hon'ble Apex Court in a case *Management of Addisons Paints and Chemicals Ltd.* V/s. *Workmen, 2001-LLR-190 Supreme Court* has given a mandate that the employee can dispute the validity of transfer even after joining at the transferred place. There was no justifiction for not reporting for duty. In the instant case, in absence of any cogent evidence, it is difficult to ascertain that the Complainant was not able to join duty at Goa because of the illness of two ladies in the house.

49. As against this, the Complainant is relying on the initial appointment letter dated 24th July 1968. Such contract of employment refers to column 9 which deals with the placement in the company. It specifies that the Complainant will place in training in either of the company's factories at Worli or at Kanjurmarg. As a plain reading to the said appointment letter, it is clear that the Complainant was kept on training for six months. Therefore, clause No. 9 when refers to the word training, it has to be read in conjuncture with clause No. 5 where there is a mention of imparting the training to the Complainant. Therefore, it cannot be said that the word training at Kanjurmarg or at Worli shall bind the employer while dealing with the concerned employee for transferring him from one place to another. In other words, the place mentioned in clause No. 9 of the appointment letter does not have any bearing on the transferability clause restricting the employer from transferring the employee outside Mumbai. Referring to the another document Exh. C-14 (Colly) dated 18th July 1973 which is offering the position in the major Motor Department of the company. There is a clause of transferability at Sr. No. 5 which spells out as below :—

"You may be employed at any of the establishment of the company and your services will be subject to interdepartmental or interestablishment transfers temporarily or permanently without any additional compensation or travelling allowance."

Apparently, it is clear that such clause does not restrict the employer in transferring the employee within Mumbai or even without Maharashtra State only. The words "at any of the establishment of the company" will itself denominates that the transfer of an employee can be made at any place wherever there are establishment. Such contract of employment being accepted by the Complainant by making endorsement to that effect on 18th July 1973 and, therefore, now the Complainant cannot agitate that the clause 5 in the letter dated 18th July 1973 Exh. C-14 refers to the transfer from Worli to Kanjrmarg or *vis-a-vis,* there is no reference about the transfer to Worli or Kanjurmarg. Therefore, the Complainant cannot take advantage of the words additional compensation or travelling allowance in case effecting interdepartmental or interestablishment transfer.

50. It is the contention of the Complainant that the establishment of Goa came into existence in 1995 and, therefore, the employer has no right to transfer the Complainant to a place which was not in existance at the time of his appointment. In my view, such clause will not be there in effecting the transfer because the contract of service dated 18th July 1973 Exh. C-14 is very clear and is in unambiguous form so far as the transferability clause is concerned. Once, there is no restriction on transfer referring to a particular place, then submission of the Complainant cannot be upheld.

51. The Complainant has relied on observation in a case of *Group Pharmaceuticals Limited* V/s. *Blossom Godinhe and another, 1997-II-CLR-911, Bombay High Court* wherein it is observed that transferring an employee at a branch which was not in existence at the time of Petitioner's joining duty will be illegal. The employer cannot be impliedly held to have powers to transfer.

52. The transfer order is also challenged by the Complainant on the ground that no reasons have been given for effecting the transfer. In my opinion, it is not necessary for the employer to give reasons of the transfer because the transfer is a normal incident of service. It is the employer to man his business and it is within the ambit of the employer to see who shall work where. Such right or administrative control of employer cannot be taken away by the Tribunals or the Courts. In a process, I have referred to the observation of Hon'ble Madras High Court in a case of *Union of India* V/s. *P. Sakthival, 1999-I-LLJ-895.* It is not given to the Tribunal be it on Administrative Tribunal to review the administrative exigencies and situation as if it is sitting in appeal over the decision of the competent administrative authority. The questions of administrative exigencies, unless positive case of *malafides* and victimisation is substantiated are to be left to the discretion and decision of departmental authorities. In view of this finding, it is very clear that once a decision has been taken considering the utility of man power to be utilised at a particular place, then such administrative decision cannot be interfered into. So far as *malafides* are concerned, as stated earlier, no *malafides* are seen nor proved. More transferring the employees after his rendering continuous service of 33 years or at the fag-and of his retirement itself will not establish *malafides.* Hon'ble parent High Court in a case of *Shivaji A. More* V/s. *Estate Manager, M.S.F.C. Ltd. and Another 1996 (72) FLR-447* has also ruled that it is well settled that in matters of transfer, the employee who has been served with the transfer order, must first report to the place where he is transferred and thereafter make a representation or take out legal proceeding there against. The inconvenience arising from transfer has been held by the Hon'ble Supreme Court to be normal incident of service not justifying interference in the transfer orders. The views of the Hon'ble Apex Court in a case of *Rajendra Roy* V/s. *Union of India and Another, 1993-I-CLR-5* are also very clear in laying the rule that unless the transfer order pruves, *malafide* or involation of the rules of services and the guidelines for transfer without any proper justification, the Court should not interfere in the said order.

53. Coming back to the situation, the transfer order is on outcome of the decision of the employer that Worli factory is not economically viable. There was a cut-throat competition and due to Government's globalisation and liberalisation policy, the company requires to face competition in the International Market. Admittedly, the Balance-sheet etc. Is not on record. The oral evidence on record is through Shri Nayak only. Inspite of that, fact remains on record that though the documents are not on record, the Complainant has also not admitted the position that the Worli unit is closed and the employees are transferred to Kanjurmarg. The Managers who are transferred to Nagar and Goa is also the factual position which is in the knowledge of the Complainant and, therefore, once this position is admitted, there is no reason or question for this Court to draw any adverse interference against the Respondent for not producing the Balance-sheet etc. The question of complying the provisions under Sec. 25(o) is also not come into operation at this juncture because the Respondent has re-organised the business by resorting to a shifting process and the employees were shifted to another unit to make the business viable and economical. This process of declaring the V.R.S. and posting the remaining employees who have not opted for V.R.S. to another unit at Kanjurmarg etc. Is an admitted position. Therefore, merely because the Complainant was not given V.R.S. and he has

been transferred to Goa itself will not establish the *malafide* sense in the transfer order. The organisation and reorganisation of the business is puragative of the management and, therefore, in that process, the employees are shifted or switched ever to the other establishment will itself not create the situation of *malafide* on the part of the employer. The same situation has arisen in the instant case. I have not found that there is any *malafide* sense in transferring the Complainant to Goa. As made it clear before the Court that there is no place for the Complainant being Assistant Production Manager at Kanjurmarg, he has been sent to Goa. Such submissions are to be read in consonance with the submissions on behalf of the Respondent before the Hon'ble High Court that as and when there is vacancy at Kanjurmarg, the Complainant will be accommodated. Therefore, any such genuine offer and acceptance of accommodating the Complainant, there cannot be any grievance for the Complainant for transferring him to Goa. In the result, I have found that there is no *malafide* in the transfer order of the Complainant and thereby there is no unfair labour practice within the meaning of item 3 of Schedule-IV of the Act.

54. *Point No. 3.*—Item 5 of Schedule-IV lays down that the employer is said to have followed unfair labour practice when he has shown favouritism or partiality to one set of workers regardless of merits. Apart from having two distinct unions working in the Respondent establishment and apart from the Complainant being a member of the particular union or not, the question of partiality and favouritism refers to the transfer of the Complainant. Once, this Court has found that there is no *malafide* in the transfer order, there is no question of consideration for favoritism or partiality. Merely because some designated Managers were transferred to Nagar and some are transferred to Goa, will not necessarily reveal that there is a sense of partiality. Besides the second part of the item deals with the merits of the action of the employer. The action of the employer in this case cannot be treated as regardless of merits because the transfer of the Complainant is an administrative decision taken by the management considering the business exigencies together with the shifting of business activity to make the business viable. Therefore, I have found that there is no sense of following of unfair labour practice within the meaning of item 5 of Schedule-IV of the Act.

55. So far as item 9 is concerned, it deals with the failure to implement, awards settlement and agreement. In the entire bulk of documents, I have not found that there is any settlement of agreement for not to transfer the employees out of Mumbai. I have also not found that the transferability clause is very silent in the service conditions offered to the Complainant mentioned in the appointment letter. In the absence of any evidence to that effect, it is nor proper to declare that the Respondents have followed unfair labour practice within the meaning of item 9 of Schedule IV of the Act only on the count of transferring the Complainant by the Respondents. In the result, my finding to the point is in the negative.

56. *Point Nos. 4 and 5* :—In the overall discussion, the resultant outcome is obviously no declaration in favour of the Complainant regarding Respondents following of any unfair labour practice. Consequently, the Complainant is not to any reliefs as prayed by him in the complaint. In the result, the complaint has to be dismissed. Hence, the order :—

Order

The complaint is hereby dismissed.

No order as to costs.

P. B. SAWANT,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 10th October 2002.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 1st November 2002.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. B. Sawant, MEMBER

COMPLAINT (ULP) No. 39 OF 2001.—Shri D. B. Pradhan, C-408, Riddhi Kalyan Complex, Yari Road, Andheri (West), Mumbai 400 061.—*Complainant—Versus*—(1) M/s. Glaxo India Ltd., 252, Dr. Annie Besant Road, Worli, Mumbai 400 025. (2) Shri V. Thyagarajan, Managing Director, M/s. Glaxo India Ltd., 252, Dr. Annie Besant Road, Worli, Mumbai 400 025. (3) Shri Anil Matai, Vice President Sales and Marketing M/s. Glaxo India Ltd., 252, Dr. Annie Besant Road, Worli, Mumbai 400 025. (4) Shri Ravindra Lamaye, General Manager Marketing and Sales M/s. Glaxo India Ltd., 252, Dr. Annie Besant Road, Worli, Mumbai 400 025.—*Respondents.*

CORAM.— Shri P. B. Sawant, Member.

Appearances.— Shri Arshad Shaikh, Advocate for Complainant.

Shri S. V. Alva, Advocate for Respondents.

Judgment

1. The Complainant has filed this complaint against the Respondents alleging against them that they have committed unfair labour practice under item 9 of Schedule-IV of the M.R.T.U. and P.U.L.P. Act, 1971 and thereby prayed for declaration and consequently, prayed that he be allowed to serve the Respondents in his present capacity together with anciliary reliefs and costs of the litigation. The facts which gave rise to the present litigation can be summarised as follows.

2. The Complainant is in the employment of Respondent No. 1 and working and working as Medical Sales Representative. On 9th November 1974, the Complainant was appointed as Medical Sales Representative in the company called as M/s. Biddle Sawyer and Company India Pvt. Ltd. It was thereafter converted into deemed to be limited company known as M/s. Biddle Sawyer Pvt. Ltd. The service conditions of the Medical Representatives are governed under the settlement entered into between the company and the Federation of Medical Representative Association and M/s. Biddle Swayer Medical Representatives Association. The letter of appointments given to the medical representatives did not lay down the age of retirement. However, the age of retirement of employees of Biddle Sawyer is 60 years.

3. In September, 1997, the Respondent No. 1 purchased 100% equity shares of Shah Group of Companies including Biddle Sawyer Ltd. etc. It is alleged that the claim of Biddle Sawyer Ltd. with the company is independent legal entity and Biddle Sawyer did not have any control over it. The agreement dated 30th September 1997 was entered into. Having acquired the ownership over the Shah Group of companies, the Respondent No. 1 started illegally and *malafide* restructuring and reorganisation of Shah Group of Companies. It is averred that there is defecto merger which has taken place and thereby all the activities of Shah Group of Companies have been integrated into the activities of Glaxo India Ltd. After the accusation, the staff members working for Biddle Sawyer at its registered office at Dalal Street were shifted to Sawant Marg, Colaba. The registered office without staff of Biddle Sawyer Ltd. was shifted to registered office of Glaxo India Ltd. The entire reorganisation has been unilaterally done by the management of the Respondent No. 1. Biddle Sawyer gave an offer to the employees of Croydon Chemical Works Ltd. for employment by Biddle Sawyer Ltd. It was assured that their services with M/s. Croydon Chemicals Works Ltd. would be regarded as services with Biddle Sawyer Ltd. for the purpose of retirement benefits. The employees who were released were paid their dues from Coffers of Biddle Sawyer Ltd. under the voluntary retirement. Those 52 Medical Representatives were shown to have resigned from the services of Biddle Sawyer Ltd. by letter dated 27th January 1999. It is also pointed out that some of the workmen of Biddle Sawyer Ltd. have been arbitrarily chosen by the Respondent for joining the folds of the Respondent No. 1. One Shri Matekar General Manager-Industrial Relations of the Respondent No. 1 has given a letter to one M/s. May Fernandes whose services were transposed to Respondent No. 1 by an appointment letter dated 4th June 1998. The Market Division of Biddle Sawyer Ltd. wherein she was working has been closed and, therefore, the Complainant reiterates the said example about the intention of the Respondent. There are letters signed by Shri Bhattacharya-Groups Product Manager of M/s. Burroughs Wellcome (I) Ltd. which is controlled and managed by the

Respondent No. 1. Consequent to accuvisition of Biddle Sawyer Ltd. etc. 3 companies' activities of Biddle Sawyer Ltd. group of companies were being rationalised. The distribution of the products were being effected through Glaxo India Ltd. and Burroughs Wellcome distribution channel and, therefore, the services of the Trustees were not required. Accordingly, all the stockiest of Biddle Sawyer Ltd. were also informed by letter dated 9th April 1999 informing that Madras office was to be closed down shortly. It is also pointed out that the staff of Biddle Sawyer Ltd. was reduced in a systematic manner by imposing V.R.S. and the work which was the filed staff was doing is now done by the field staff of Glaxo India Ltd. and Burroughs Wellcome.

4. It is pointed out that pursuance to the accuvisition, the Medical Representatives of Biddle Sawyer Ltd. were informed that they will be absorbed in the services of the Respondent No. 1. Thereafter, they were informed that due to various litigation pending between the employees of Biddle Sawyer Ltd., and Glaxo India Ltd., it was necessary for convenience to show an austensible resignation from the said Biddle Sawyer Ltd. and austensible fresh appointment by the Respondent No. 1. It was merely a ratifies adopted for the purpose of welfare legislation and to avoid inconsistency in the stand taken by Biddle Sawyer Ltd. and Glaxo India Ltd. in the pending litigation. On 25th January 1999, the remaining 58 Sales Staff of Biddle Sawyer were called for training at the Respondent No. 1's Training Centre. On the last date of training, the workmen were handed over the resignation letters to be submitted to Biddle Sawyer Ltd. and the appointment letters of the Respondent No. 1. It was informed to them that since they have availed of the training, there was no chance of extending V.R.S. to the 58 Sales staff. The resignation was accepted by letter of the same dated singed by Shri Matekar of Glaxo India Ltd. It is alleged by the Complainant that the fraud was played on the Complainant amongst other Sales Staff whereby the situation was created that he had no option but to accept the appointment letter dated 27th January 1999 and he retrained from raising the objection.

5. By letter dated 25th August 2000, the Complainant was informed that he would be completing 55 years of age on 21st January 2001 and, therefore, automatically retire from service of the company on the close of working hours of 20th January 2001. One of the clause in the appointment letter given to the Complainant was objectionable as his age of superannuation was reduced from 60 to 55, though the age of existing sales staff was 60 and the staff which was absorbed from M/s. Burroughs Wellcome, they have age of superannuation at 58 years. The Complainant by his oral submission to the management raised the issue about his age of retirement but in vain. He also approached the Commissioner of Labour but finally the Respondent informed the decision by letter dated 4th January 2001 and the Complainant was asked to complete the formality of obtaining clearance certificate etc. After exhausting all the remedies, the Complainant has left with no option but to approach the Court. Hence, the complaint. It is averred that the company is having 3 ages of retirement is guilty of irrational discrimination and violation of implied agreement of service. The Model Standing Orders applicable to the employees of the Respondent are having age of retirement is 60. The Respondent is guilty for violating the term thereof. Therefore, the Complainant prays for declaration and relief as stated earlier.

6. The Respondent has resisted all the contentions by filing written statement *vide* Exh. C-6 contending *interalia* that the complaint is false and frivolous and the same is liable to be dismissed. It is denied that the Respondents have committed any unfair labour practice. It is denied that there is a fraud practiced by the Respondent on the Complainant. It is denied that the Complainant is entitled for continuation of service till the age of 60 years and it is denied that the Complainant is entitled for all the anciliary and consequential reliefs claimed by the Complainant. It is the first and foremost contention that the complaint is barred due to misjoinder of parties as Respondent No. 2 is not necessary party to the complaint. The Complainant has already availed the remedy provided under the Industrial Disputes Act. Therefore, the complaint is barred under Sec. 59 of the Act.

7. It is the case of the Respondent that the Complainant has resigned from the service of the company. The resignation was accepted. The Complainant was appointed and worked on the terms and conditions stipulated in the letter of appointment. Clause 15 to the said appointment letter deals with the age of superannuation. The Complainant has accepted the offer and has joined the service. The Complainant has not attended the meeting called by the Commissioner of Labour and lost the opportunity to make representation. Thereby the Complainant is now estopped from disputing the age of retirement.

8. A reference to the service conditions offered to him by Biddle Sawyer Ltd. are of no use by the Complainant after joining Glaxo India Ltd. Clause 23 of the settlement dated 17th August 2000 is applicable to the Complainant. The retirement age of Medical Representatives shall be as per the relevant provisions in the respective letter of appointment. It is also pointed out that about 1500 Medical Representatives in the employment of the company have 55 years as age of retirement.

9. It is pointed out that reorganisation is puragative of the management. It is also pointed out that there is no merger between Biddle Sawyer and Glaxo India Ltd. The averment regarding *malafide* restricting or reorganisation has been denied by the Respondent. It is denied that the Respondent has chosen the employees arbitrarily. Though the merger is denied by the Respondent, it is expected that the Respondent No. 1 has purchased and thereby acquired the company. It is denied that the Complainant was compelled sign any appointment letter of the company or sign letter of resignation of Biddle Sawyer Ltd. The company has denied any force being used against the Complainant for accepting the appointment letter. It is contended that even after the acquisition, Biddle Sawyer Ltd. continued to be a separate legal entity. It is denied that the ownership and management of Biddle Sawyer has been transferred to new employer or that any service conditions are altered in any way. With this and other grounds, it is prayed that there is no substance in the complaint and the Complainant must fail.

10. On these rival contentions of the parties, following points arise for my determination :—

Issues	*Findings*
(1) Whether the Complainant has proved that the Respondents have committed unfair labour practices under item 9 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971 ?	Negative.
(2) Whether the Complainant is entitled to the relief of declaration as prayed for ?	Negative.
(3) To what consequential relief, the Complainant is entitled to ?	No relief.

Reasons

11. *Point No. 1.*—After going through the elaborate submissions advanced on behalf of the Complainant and the Respondents, I have referred to my initial order below Exh. U-2 as well as the order passed by the Hon'ble High Court in Writ Petition preferred against the said order. While deciding the application, I have observed in para 15 page 10 that in my considered opinion, the fact that there is a merger has to be established first. The said aspect seems to have been stretched much by the Respondent before Hon'ble High Court in Writ Petition No. 4441 of 2001 wherein submissions seem to have been put up that the Industrial Court has held that there is a merger which has to be established first and then only, to extend the same service conditions or breach if any.....will come into for consideration. While referring to the word merger this Court was in pursuance of the contention that there is a defact merger. However, while deciding the application for interim relief, the final conclusion could not have been drawn and, therefore, this Court has held that if the fact that there is merger as agitated, the same will have to be established on merits and, therefore, the matter was left on the parties to prove when the entire complaint will come for hearing finally.

12. The above situation has led me to refer the averment in the Complainant first so far as merger is concern and proposition under Section 25FF of the Industrial Disputes Act. Section 25FF deals with paying compensation to the workmen in case of transfer of undertaking. It lays down that :—

> "Where the ownership of the management of an undertaking is transferred, whether by agreement or by operation of law, from the employer the relations to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfers shall be entitled to the notice and compensation in accordance with the provisions of Section 25F as if the workman has been retrenched."

The provisions under the above proposition, shall not apply as mentioned in the proviso clause provided the conditions are complied with. Those are :—

(*a*) The service of the workman has not been interrupted by such transfer.

(*b*) The terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before transfer.

(*c*) The new employer is under the term of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

The explanation under the Section clarifies that Section 25FF entitles a workman to notice or wages in lieu of notice and compensation in case of transfer of ownership by the management of an undertaking from one employer to another. The effect of Section 25FF, therefore, is that if an industrial undertaking is transferred, the employees of such transferred undertaking should be entitled to compensation unless, of course, the continuity of their services or employment is not disturbed and that can happen if the transfer satisfies 3 conditions under the proviso. If none of the 3 conditions are established, the employer will not be liable to give notice and compensation on transfer of ownership or management of undertaking.

13. On this legal proposition, the Respondent is resisting the contention of merger *in toto* by the Respondent No. 1 and points out that the Complainant is simply seeking extension in the retirement age applicable to him as per the appointment letter. Therefore, according to the Respondent, the change in the name or conversion of names of the company Biddle Sawyer and Company Ltd., to Biddle Sawyer Pvt. Ltd. will have no relevance to the retirement of the Complainant. The Respondent vehemently asserts that there is no merger as such and also asserts to concentrate on the resignation submitted by the Complainant. The Complainant has made much hue and cry regarding the letter correspondence signed by Shri Matekar on behalf of Biddle Sawyer etc. and in that context, the Respondent accepts that M/s. Biddle Sawyer Ltd. was acquired by Glaxo India Ltd. by purchase of its shares but not resorting to any margin process.

14. On this set of facts, the oral evidence on record needs to be construed to ascertain the variasity of the submission of the Complainant. The Complainant has chosen to examine Shri Iyyar who is the employee of Biddle Sawyer. Besides, the union activist. Shri Iyyar was working as Typist-*cum*-Clerk and his services were utilised by so many officers. On the basis of which, he asserts that he is aware with the entire managerial structure of Biddle Sawyer. He points out that pursuance to the acquisition, Shri Khushrokhan become Chairman of Biddle Sawyer and he was Managing Director of Glaxo India Ltd. He then after issued letters to all the employees of Biddle Sawyer group about the change in the management and ownership. He has given names of various executives of Biddle Sawyer and Glaxo India Ltd. He has reiterated duly capacity of Shri Khushrokhan concerning that the company with Biddle Sawyer and Glaxo India Ltd. by signing a staff notice. The entire concept of both the companies does not reveal of the merging process. Therefore, though one executive is working for another, the same will have to be looked into from the point of view that the Respondent No. 1 has acquired Biddle Sawyer Ltd. by purchase of 100% shares.

15. It is pertinent to note that Shri Iyyar has admitted that Biddle Sawyer, Croydon and Meghdoot are 3 different companies and legal entities. It is pertinent to note that Shri Iyyar admits that a notice was published for closing Biddle Sawyer with effect from 30th June 2002. Shri Iyyar has admitted that he is not aware as to whether there is no merger between Glaxo India Ltd. and Biddle Sawyer. Considering the evidence of Shri Iyyar and the manner of leading such evidence, it is clear that there is no sufficient evidence of merging process. The only aspect on which the Complainant is relying on the letter correspondence. The letter correspondence produced *vide* Exh. U-6 on the letter of Glaxo India Ltd., Biddle Sawyer and Durroughs Wellcome dated 1st January 1998, 5th January 1998 bear the signature of Shri Khushorkhan Managing Director. In the letter dated 1st January 1998, he has explained the intention to acquire Biddle Sawyer group of companies and reiterates that the submissions

have been accorded by the Central Government and thereby all the 3 companies will he transferred to Glaxo India Ltd., and the ownership of 3 companies will be wich Glaxo India Ltd. By letter dated 5th January 1998, the process of transferring the ownership of Biddle Sawyer of Shah family to Glaxo India Ltd. appears to have been completed. Further paper cutting remained as it is on record having a reference regarding completion of acquisition process. Thereafter, the staff notice signed by Shri Khushrokhan dated 21st January 1998 under designation of Chairman of the Boards of Biddle Sawyer group of companies. It also refers to the change of ownership of Biddle Sawyer group and also refers to the changes to the operations of group by keeping an independent legal status of the group of companies *i. e.* Biddle Sawyer has unchanged.

16. By referring to all the letter correspondence, Learned Advocate Shri Shaikh has submitted that the Court has to lift the veil of corporate entity and to pay regard to the economic reality behind legal facade. He has also emphasisted need investigating into the facts in the present complaint to ascertain relationship between Glaxo India Ltd. and Biddle Sawyer. The submissions appears to be on the point of calling the agreement between Biddle Sawyer and Glaxo India Ltd. Accordingly, this Court has called the agreement for sale of shares between Glaxo India Ltd. and all Shah group described as premature No. 1 to Premature No. 7. The terms and conditions embodied therein regarding the payment of prices, effective date and completion date etc. need not be discussed, here or reproduced here. The agreement was called for to ascertain the position of the employees on the roll of Biddle Sawyer group on the date. The clause Nos. 11 on page 15 of the agreement relates to undertaking of not increasing the existing staff of Biddle Sawyer group. Therefore, excepting these propositions about the existing staff there is nothing material to construe about the fats of existing employed working with Biddle Sawyer. It is, therefore, clear that calling of the agreement from the company was of no use. In pursuance of this conclusion, now the question of merger has to be looked into through the observation of Hon'ble High Court in Writ Petition No. 1804/1998 in between Chemical Employees' Union and Biddle Sawyer Ltd. in Appeal No. 1136 of 1998 in para 3, Hon'ble Their Lordships have observed that the Respondent company Biddle Sawyer and Glaxo India Ltd. are not merged and hence, are 2 separate entities. These findings of fact is on the date when the order was passed *i. e.* on 11th November 1998. Hon'ble Single Judge while deciding the Writ Petition No. 1804 of 1998 against which the Appeal has been decided has also observed (1999-I-CLR-254) that at that stage, there is no merger. Therefore, the position at the time of filing the complaint still requires to be looked into to trace out whether the process of merger has been completed or not.

17. The legal position envisaged under Sec. 25FF regarding the transfer of ownership of the management has been explained for application under sub Section (3) that the ownership of the management of the undertaking has to be transferred from the employer in relation to that undertaking to new employer. The transfer may be effected by agreement or by operation of law. The explanation below the section clarifies all cases which to not fall under the proviso to the Section, a transfer of ownership of management of an individual undertaking, every workmen who has been in continuous service for not less than one year in that undertaking immediately before such transfer, shall be entitled to notice and compensation in accordance with the provisions under section 25F. The only claim, the workmen of trasnferred establishment can legitimately make his claim for compensation against their employer. They cannot claim reemployment from the transfer. On the back drop of this legal aspect, the facts on record envisages that Glaxo India has purchased 100% share of Biddle Sawyer under the agreement. The agreement is on record and there is no dispute about the said transaction. The dispute appears to be of this particular employee that too pertaining to a one clause of service conditions. Admittedly, the record indicates that the Complainant has submitted his resignation which was accepted and thereafter acceptance has no where been challenged and the Complainant has safely joined M/s. Glaxo India Ltd. on the terms and conditions laid down in the appointment letter. This particular aspect will have to be taken into consideration by referring to the evidence laid on behalf of the company through Shri Kapote who is Assistant Human Resources Service Manager Pharma Exh. C-13 but at a latter phase. At this juncture, the discussion has to be concluded so far as proposition of Section 25FF of the Industrial Disputes Act is concerned to the hilt of it by referring to the various citations relied on by both the parties.

18. Hon'ble Apex Court in a case of *Ahakapalle Co-operative Agricultural and Industrial Society Ltd.* V/s. *Workmen and others, AIR 1963 S. C.-1489* wherein the principle laid down is that :—

> " The first part of Sec. 25FF postulates that on a transfer of the ownership or management of an undertaking, the employment of workmen engaged by the said undertaking comes to an end and it provides for the payment of compensation to the said employees because of the said termination of their services, provided, of course, they satisfied the test of the length of service prescribed by the section."
>
> " The double benefit in the form of payment of compensation and immediate re-employment cannot be said to be based on any consideration of fair play or justice. The fair play and justice obviously means fair play and social justice to both the parties."

Hon'ble Their Lordships have considered the issue or re-employment of a retrenched employee in the manner prescribed above within the meaning of Sec. 25H of the Industrial Dispute Act. Section gives an entitlement for retrenched employee seeking an opportunity first to offer himself for re-employment shall be given such employment by way of preference. This proposition, however, in view of Hon'ble Their Lordships indicates that :—

> "Section 25H does not apply to the case of a genuine transfer of an industrial concern, nor can the general principle underlaying the provisions of said section be invoked in dealing with the claim that they should be re-employed made by the workman of the transferor company against the transferee society."

In the light of this fact, the question of re-employment in my view need not be raised or discussed at length as because the employee is claiming extension of service with Glaxo India Ltd. and not with Biddle Sawyer. The extension therefore, is in accordance with the earlier service conditions and not as per the service conditions offered to the employees after as joining Glaxo India Ltd.

19. Learned Advocate Shri Shaikh has relied on the observation of Hon'ble Division Bench of our High Court in a case of *Chavan N. J.* V/s. *Sawarkar P. D., 1958-LLJ-36.* It is a case of lease of Cinema theater with all equipments to enable the Lessee to run the cinema business. The busniness was continued by the Lessee in the same premises with the same machinery and equipments and with the same licence. The employee who were appointed by the Lessor were subsequently re-appointed and, therefore, the question which was raised for continuity of such employee was resolved that these employees are entitled for continuity of service qua the Lessees. The factually, Glaxo India Ltd. has purchased 100% shares. Therefore, there is no question of entering into any Lease-Deed. The question of continuation of some employees under transfers has been resolved because the Complainant in this case has submitted his resignation, which was accepted. Therefore, though the Complainant has been given an appointment, it was on certain service conditions introduced by Glaxo India Ltd. and there was no sense of continuing the existence of Biddle Sawyer by virtue of this proposition, the case relied on by the Complainant defers on fact. In a case of relied on by the Complainant *i. e. Dattatraya Shankarrao Kharade and Others* V/s. *Executive Engineer, Chief Gate Erection Unit No. 2 Nagpur and Another 1994-I-CLR-1022* wherein the rule laid down is that the terms and conditions of service regulated by Sec. 25F and 25G of the Industrial Disputes Act form implied terms of the individual contract of employment of each workman to whom the said provisions are applicable and consequently, non-compliance of the said provisions attract item 9 of Sch.-IV of the Act. Hon'ble His Lordship has further ruled that Mensera is not necessary for constituting the unfair labour practice under the Act. Section 25G of the Industrial Disputes Act lays down the procedure for retrenchment by following the rule of last come first go. Admittedly, in the instant case, no such question has arisen. It is in the evidence of Shri Iyyar that the managerial person of Glaxo India Ltd. visited Biddle Sawyer and informed about the accusation about Biddle Sawyer and also displayed a notice. Shri Iyyar has heavily placed reliance on the correspondence signed by Shri Khushrokhan who became Chairmen in Glaxo India Ltd. The notice along with Exh. U-6 is also relied on including the individual letter issued by Shri Khushrokhan about the change in management and ownership. Shri Iyyar has explained the paraphenia in the Glaxo India Ltd. including the names of those who are concerned with

the manufacturing and production activities of Glaxo India Ltd. He has also explained that the persons who were employees of Biddle Sawyer have become the employees of Glaxo India Ltd. after the staff notice dated 21st January 1998. This particular aspect has taken Shri Iyyar to stretch a point that the service conditions which the employee in the earlier establishment was enjoning has to be carried forward and, therefore, he asserts that age of 60 years which was a part of service conditions was required to be extended to the employee like the Complainant. Having gone through the entire evidence of Shri Iyyar, it is transpired that his service conditions are governed by the settlement signed between the Chemical Employees Union and the Management of Biddle Sawyer. He has admitted that from 30th June 2002, Biddle Sawyer is closed. It is pertinent to note that he has expressed his lack of knowledge about the Complainant's resigning from Biddle Sawyer and joining on 27th January 1999 again with Glaxo India Ltd. As against this Shri Pradhan has explained that prior to last date of his service, there was no indication that he will require to resign from the service for joining in Glaxo India Ltd. He further asserts that he has raised objection regarding the service conditions mentioned in the appointment letter. However, on strict scrutiny of the document and evidence, I have found no signs of such raising objection. Excepting Exh. 'E' dated 17th October 2000 annexed to the complaint, the letter is addressed to Shri Khushrokhan Managing Director by the Complainant. The said letter indicates that the Complainant has requested to extend the age of retirement. Therefore, the question arises that when the Complainant was aware of the service conditions of 27th January 1998, he has availed the same service conditions for about two years and thereafter is raising a dispute at a very belated stage. The acceptance of service conditions and continuing the service pursuant to the said service conditions has now espoused the Complainant from raising any dispute. On this conclusion, I have found that the continuation of the Complainant after receiving the letter from the company on 25th August 2000 is a belated action. Besides the Complainant though has received a letter dated 25th August 2000 from the General Manager Marketing and Sales, he has raised applause on 17th October 2000 and not immediately or forthwith. On this situation, the fact remains that the Complainant was the executive committee member of Glaxo India Limited Employees' Union since February, 1999 till his retirement. This fact clearly postilates that there was an opportunity for the Complainant to raise the issue in the meeting or through the union. It is very pertinent to note that the Complainant expressed his lack of knowledge about his getting benefits of service conditions. He is not aware of the settlement Exh. C-8 and Exh. C-12. Besides all these contention, it is very important to note that the Complainant has plainly stated that on 27th January 1998, he came to know about his age of retirement.

20. In the above situation, the evidence on behalf of the company Shri Kapote who asserts that there is no merger. Learned Advocate Shri Shaikh has taken Shri Kapote through the elaborate cross examination. However, nothing incriminating could be traced by him, so far as merger is concerned. In para 5 of the cross examination, he has admitted that 52 Medical Representatives including the Complainant were tested by Glaxo India Ltd. and then taken up in service. Inspite of the fact, Shri Khushrokhan has no knowledge as to whether there was any advertisement or not. It is true that the admission of Shri Khushrokhan that some of the Medical Representatives did have age of retirement as 60 and those Medical Representative having 60 years of age of retirement, were there when the Complainant was given appointment. This particular aspect has been clarified by Shri Khusrokhan in the subsequent phase that whatever appointment letter given to the Complainant was in the form of offer given to him. The said offer was accepted by the Complainant.

21. Learned Advocate Shri Shaikh has relied on the admission of Shri Khushrokhan that the Complainant has to accept the appointment letter for joining the service with Glaxo India Ltd. along with term thereunder. This particular aspect in my view, will not extend to a conclusion that the Complainant was compelled or forced to accept such appointment. In fact, the Complainant has accepted the appointment letter, worked for two years with same service conditions and after completing two years, he raised a dispute by requesting the Managing Director to extend his age of retirement. Therefore, merely saying by Shri Khushrokhan that the Complainant has to accept the appointment letter will be of no avail.

22. After considering the only evidence in this regard, documents on record are being referred by both the parties. Exh. C-12 is settlement dated 18th August 2000 signed between the Glaxo India Limited Employees' Union and Glaxo India Ltd. It relates to the wage revision and other benefits. Subsequent to that, the Minutes of Executive Committee dated 21st November 2000 between the management and Glaxo India Employees' Union are also produced on record. The authority given to Shri Matekar under the Power of Attorney by Biddle Sawyer is also on record. All these documents reflect the discussion and instance of regular activity going on in the Respondent company as well as with the Glaxo India Employees' Union. This has nothing to do with the extension of age of the Complainant mentioned in the appointment letter and accepted by him accordingly. Therefore, I again refer to the elaborate citations relied on by learned Advocate Shri Shaikh. In a case of *Madanlal Arora and Management/Director, All India Institute of Medical Sciences and others, 1999 (83) FLR-766* relates to termination of service on the basis of the conditions stipulated in the contract. The termination relates to some charger on the basis of which, he was dismissed from service. Therefore, the reinstatement is resolved being awarded when the termination is held to be illegal. I do not find that any of these items will behaving concern with the present set of facts of the case. So also the observation of Hon'ble Supreme Court in a case of *The workmen employed in Associated Rubber Industry Ltd.* V/s. *The Associated Rubber Industry Ltd., AIR 1986 Supreme Court-1.* Hon'ble Apex Court has issued a guidelines to the subordinate Courts that in a case of tracing out the legal entity, the duty of the Court that in every case where ingenuity is expended to avoid taxing and welfare legislation to get behind the smoke-screen and discovers the true state of affairs. The Court is not to be satisfied with form and leave well alone the substance of the transaction. Referring to these guidelines and to the facts of the instant case, I have tried to lift the veil to find out the real purport of the incidence and I have found that the question of merger cannot go into as 100% of the shares are being purchased. The employees of Biddle Sawyer have resigned. Their resignations were accepted. Some of them after testing their capacity, were taken up in employment by Glaxo India Ltd. and certain service conditions were offered to them. Those service conditions are accepted by the employees and have actually worked on the same service conditions by making no grievance immediately. This situation will spotlessly reflect that the grievance raised is an after thought. The legality of the transaction of purchasing of 100% shares has no where been challenged nor the legality of the said transaction was required to be challenged. In the process, the entire scenario occured in between Biddle Sawyer and Glaxo India Ltd. cannot be viewed suspiciously. The observations in a case of *Asha Vij* V/s. *Chief of Army Staff and Others, 1999-I-123* is again pertaining to the legality of termination of service. Such is not the situation here. Even though the service of the Complainant is brought to an end by virtue of resignation, it was considered to be a voluntary resignation and it was never withdrawn by the Complainant nor raised any alarm regarding the termination of his service by due res, undue influence or any other ground, by way of accepting the resignation. In pursuance of this position, the mandatory provision for bringing the service to an end as referred in *West Bengal State Electricity Board and others* V/s. *Desh Bandhu Ghosh and others, AIR 1985 S. C. 722* may not come into as the facts stand on different footings.

23. The payment of compensation while dealing with the transposition of the establishment within the meaning of Section 25FF has been dealt with by Hon'ble Supreme Court in a case of *R. S. Madho Ram and Sons (Agencies) (Private) Ltd. and another* V/s. *Its workmen (Madho Ram and Sons Employees' Union) 1964-I-LLJ-891, 366.* The factual aspects are already being discussed. The employees working in Biddle Sawyer have resigned and then only, they were taken in Glaxo India Ltd. The transfer of the management, therefore, whether will consider the transferee as successor in interest has been discussed and ruled by Hon'ble Their Lordships of Hon'ble Supreme Court in a case of *Anakapalla Co-operative Agricultural and Industrial Society and Its workmen and Others (Supra).*

24. Learned Advocate Shri Shaikh has pointed out that Glaxo India Ltd. is also dealing with pharmaceutical business and has acquired 100% of equity shares. Therefore, Glaxo India Ltd. has become the authority to settle the service conditions of the employees and, therefore, has become a successor in interest of the Biddle Sawyer. By virtue of this being successor on

interest, it is submitted that certain liabilities and rights are required to be taken on and, therefore, on account of interruption of service, the retrenchment compensation is required to be paid by the employer. In consonance with this stipulation, Shri Shaikh Advocate has further pointed out that once Glaxo India Ltd. has accepted the Complainant as its employee, then it was incumbent to comply under section 25FF. The whole concept as being agitated by learned Advocate Shri Shaikh before the Court refers to the point that the Complainant has been retrenched and then immediately being taken by Glaxo India Ltd. The factural aspect on record is otherwise because after submitting the resignation and accepting the same, the appointment has been accepted on the conditions thereto as offered by Glaxo India Ltd. In pursuance of that, keeping silence for years together and continuing the same service conditions, will itself is an increment in granting the relief to the employee concerned.

25. In a case of *Anakapalla Co-operative Agricutlural and Industrial Society (Supra)* Hon'ble Their Lordships have referred to the requirement for considering the transaction interse and ultimately has proved that if the 3 conditions specified in the proviso of Section 25FF are satisfied, there is no termination of service either in fact or in law and so there is no scope for any payment of compensation. The benefits to be award have been construed by Hon'ble Lordship referring to the intention of the legislature which is being very eloquent needs to be reproduced here :—

> " The effect of the enactment of section 25FF is to restore the position which the legislature has apparently in mind section 25FF was originally enacted on 4th September 1956."

By amending section 25FF the legislature has made it clear that if the industrial undertaking are transferred, the employees of such transferred undertaking should be entitled to compensation unless, of course, the continuity in their service or employment is not disturbed and that can happen if the transfer satisfied 3 requirements of proviso. Having regard to the conditions to the proviso clause and by virtue of the resignation submitted by the Complainant, the appointment given by Glaxo India Ltd. to the Complainant, will necessarily reveal that there is no applicability of section 25FF of the Industrial Disputes Act. With all these contentions, the service conditions offered to the Complainant were accepted by him which show that they were not less than the service conditions which he was getting excepting the age of retirement. Therefore, in pursuance of the factual aspect which has been repeated here, I am of the view that there is no breach of any service conditions with the hands of the Respondent. Therefore, obviously, the finding to the Point No. 1 is in the negative.

26. *Point Nos. 3 and 4* .—In view of the elaborated discussion above, once it is transpired that there is no unfair labour practice on the part of the Respondent within the meaning of item 9 of Schedule-IV of the Act, there is no question of granting any anciliary or consequential reliefs to the Complainant. In the result, the complaint must fail. Hence, the order :—

Order

The complaint is hereby dismissed.

No order as to costs.

P. B. SAWANT,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 22nd October 2002.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai,
Dated the 2nd November 2002.

BEFORE THE MEMBER, INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (ULP) No. 88 of 1994 —Divisional Controller, Maharashtra State Road Transport Corporation, Kolhapur Division, Kolhapur.—*Petitioner Versus*—Shri Ananda Krishna Mandle, A/p. Malemudshingi, Tal. Hatkanangale, Dist. Kolhapur.—*Respondent.*

Since deceased pending the Revision Application, through his L. Rs.—

(1) Mrs. Mangal Ananda Mandle,

(2) Miss Bharati Ananda Mandle,

(3) Master Kamlesh Ananda Mandle,

(4) Master Umesh Ananda Mandle.

CORAM.— Shri C. A. Jadhav, Member.

Advocates— Shri M. G. Badadare, Advocate for the Petitioner.

Shri D. N. Patil, Advocate for the Respondent.

Judgment

(Dated the 16th October 2002)

This is a revision by original Respondent-M. S. R. T. Corporation challenging legality of Judgment and Order passed in Complaint (ULP) No. 145/1987 by Labour Court, Kolhapur whereby it is directed to employ its driver-Original Complainant as a fresh employee on the post of driver.

2. I must state at this stage itself that Original Complainant present Respondent died on 6th September 1995 and then his heirs are brought on record. Admittedly, present Respondent (now deceased and hereinafter referred to as 'the Original Complainant') was in employment of present Petitioner (hereinafter referred to as 'the Corporation') as a driver from the year 1979. The Corporation served a charge-sheet dated 20th May 1986 upon him alleging misconducts under Items 11, 22, 27 and 42 of its Discipline and Appeal Procedure mainly alleging reckless driving on 21st December 1984, causing damage to Corporation's bus and a private truck by dashing the same and resulting death of private vehicle's cleaner thereby. The Complainant denied the charges and then and enquiry took place. The Enquiry officer held that all charges are proved. Ultimately, the Complainant came to be dismissed on 14th November 1986. He preferred first departmental appeal which came to be dismissed on 22nd April 1987.

3. Above complaint was filed on 21st July 1987 alleging that the enquiry was conducted with utter disregard to the principles of natural justice. All documents were not supplied to the Complainant. Findings of the Enquiry Officer are perverse. Besides, Complainant's past record was not considered. Finally it was alleged that the Corpoarion has indulged into unfair labour practices under Items 1 (a), (b), (c), (d), (f) & (g) of Schedule IV of the M.R.T.U. & P.U.L.P. Act, 1971.

4. Corporation filed its written statement at Ex. C-8 contending that the Complainant committed grave and serious misconduct and hence, the Enquiry was initiated wherein rules of natural justice were followed. Findings of the enquiry officer are not perverse but justifiable. The Complainant was found quilty for causing a fatal accident. As such, punishment of dismissal was legal and proper. Finally it prayed for dismissal of the complaint.

5. The Labour Court framed issues at Exh. 10 and the parties went to the trial. The Complainant admitted legality of the enquiry, *vide* pursis Exh. 15. None of the parties led oral evidence. The Corporation produced entire enquiry papers alongwith Complainant's default card. The Complainant was also prosecuted by police before Judicial Magistrate First Class at Shor, *vide* Regular Criminal Case No. 2/1985 wherein he was acquitted on 20th October 1989. Copy of the Judgment thereof was produced by him, with list Exh. U-9.

6. The Labour Court, on perusal of evidence and hearing both parties, held that findings of the Enquiry Officer are well justifiable and not perverse. It also observed that Complainant's acquittal by the J. M. F. C. Bhor does not make findings of the Enquiry Officer perverse. It then held that such is the first misconduct of the Complainant and does not warrant punishment of dismissal. Ultimately, it held that the dismissal is an unfair labour practice and partly allowed the complaint, as above *vide* Judgment and Order dated 30th April 1994. The same is challenged in this revision.

7. I heard both Advocates. Considering rival submissions, following points arise for my determination :—

(1) Whether impugned finding that punishment of dismissal is unwarranted and disproportionate, is justifiable ?

(2) What order ?

8. My findings, on above points, are as under :—

(1) Yes.

(2) The Revision Application is dismissed.

Reasons

9. This being a revision under Sec. 44 of the M.R.T.U. & P.U.L.P. Act, 1971. it is not necessary to scrutinise rival contentions meticulously. The only material question is whether documents on record are incapable of supporting impugned order ? In other words, whether impugned order is perverse or justifiable ?

10. It also needs to be stated that the Complainant has not filed counter revision challenging Labour Court's finding that findings of the Enquiry Officer are not perverse. As such, said finding has now become conclusive. Even otherwise, I find the same to be well justifiable and sustainable in law.

11. Now the material question arises is whether punishment of dismissal is shockingly disproportionate or otherwise ?

12. Advocate Shri Badadare, representing the Corporation tried to canvass that the Complainant is quilty of causing a fatal accident and his reemloyment, even as a fresh one was dengerious to lives of the passangers. But the Labour Court extended misplaced sympathy. In reply, Shri Patil, Learned Advocate representing heirs of the Complainant argued that decision in *Divisional Controller, Bhandara* V/s. *Gulab T. Bhandarkar* reported in 1998 (I) Mh. L. J. at page 818 is squarely applicable here. Complainant's past record serves as a barometer. There is no such fast misconduct at Complainant's credit. He then submitted that the Complainant has now died, was not employed and hence his heirs be given monetary benefits for the requisite period.

13. It is observed in Divisional Controller *V/s.* Gulab T. Bhandarkar (referred above) that the past record serves as a barometer to consider the nature of punishment which is to be imposed. The case of an employee who commits misconduct on one occasion is certainly different from that of an employee who has been charged on several occassions for misconduct and misconduct proved against him. Similarly, the nature of misconduct would also be a factor relevant for imposing punishment. In the present case the Complainant's past record is good. Learned Labour Court, therefore, has rightly held that punishment of dismissal was shockingly disproportionate. I, therefore, find that there is no substance in this revision application. Accordingly I answer point No. 1 in the affiemative.

14. The Corporation has not appointed Original Complainant as a fresh driver, as per directions of learned Labour Court. Now he has expired on 6th September 1995. As such, Advocate Shri Patil rightly submitted that his heirs be paid monetary benefits for such period. As such, the Corporation is directed to pay all monetary benefits to heirs of the Complainant as if he has worked as a driver afresh from 30th April 1994 to 6th September 1995.

15. Finally I pass following order :—

Order

(*i*) The Revision Application is dismissed.

(*ii*) The Corporation is directed to pay monetary benefits to heirs of Original Complainant as if he has worked as a driver afresh for the period from 30th April 1994 to 6th September 1995.

(*iii*) No order as to costs.

C. A. JADHAV,
Member,
Industrial Court, Maharashtra Kolhapur.

Kolhapur,
Dated the 16th October 2002.

V. D. PARDESHI,
Assistant Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT,

MAHARASHTRA, AT KOLHAPUR

REVISION APPLICATION (ULP) No. 49 of 1997.—The Dean, Government Medical College, Miraj, Dist. Sangli.—*Petitioner Versus*—Shri Girish Vitthal Malvade, R/o. Sacchidanand Sanmitra Housing Society, Pandharpur Rd., Near Medical College, Miraj, District Sangli.—*Respondent.*

In the matter of Revision u/s. 44 of the M.R.T.U. & P.U.L.P Act, 1971.

CORAM.— Shri C. A. Jadhav, Member.

Advocates.— Shri S. R. Pisal, Asstt. Government Pleader for the Petitioner.

Shri K. D. Shinde, Advocate for the Respondent.

Judgement

(Dictated in open Court)

This is a Revision by original Respondent Government Medical College, Miraj challenging legality of common order passed below Exh. U-2 and U-9 in Complaint (ULP) No. 56/96 by Labour Court, Sangli, whereby, the College is directed to maintain status quo regarding service conditions of its Currier - original Complainant till decision of main complaint.

2. Present Respondent (hereinafter referred to as the Complainant) filed above complaint, *inter alia*, contending that Dean of Government Medical College (hereinafter referred to as the Petitioners) appointed him as Currier on 6th November 1993 and continued his appointments from time to time, by separate orders of 29 days each. He then worked till 29th May 1996 and then was orally terminated on 30th May 1996. It is alleged that such termination is contrary to provisions of Section 25F and 25G of the I. D. Act, Eventually, he prayed for reinstatement with continuity of service and full back wages. He also made an application (Exh. U-2) for interim temporary reinstatement. It has come on the record that the Complainant was again appointed for 29 days on 14th June 1996, 1st August 1996 and 29th August 1996. Order dated 29th August 1996 was for the period from 2nd September 1996 to 30th September 1996. It is also alleged that he has put continuous service of more than 240 days in each calender year and his proposed termination on 30th September 1996 in violation of provision of Section 25F and 25G of the I. D. Act, is an unfair labour practice. He then filed an Application (Exh. U-9) to direct the College not to terminate his services and maintain status quo, till decision of main complaint.

3. College filed its say at Exh. C-3 and C-4 contending that the Complainant was appointed for a fixed period and for specific purpose. The Complainant gave an undertaking that his appointment is temporary and will not claim any right of employment. He was interviewed on 10th May 1996 and 30th May 1996 for the post of Currier but the Committee did not find him fit. In such circumstances, he was appointed for 29 days. He never put continous service of more than 240 days, as alleged. Finally, the College prayed for dismissal of interim applications as well as the complaint.

4. The Complainant produced his various appointment orders. The College produced intervew papers and Government Resolution dated 16th July 1987 regarding temporary appointments.

5. Learned Labour Court, on parusal of material produced on record and hearing both parties, observed that the Complainant has worked for more than 240 days and hence his initial termination is with undue haste. It then dis-believed College's plea of appointing the Complainant during leave period of other employee and found that the Complainant is appointed against clear vacant post. It also observed that the Complainant was selected through proper channel on the recommendations of Employment Exchange. Finally, it held that *prime facie* case of unfair labour prectice is made out and allowed interim applications Exh. U-2 and U-9, as above, *vide* order dated 30th September 1998. The same is challenged in this Revision.

6. I heard both sides. Considering rival submissions, following points arise for my determination.

(*i*) Whether impugned interim order warrants interference ?

(*ii*) What order ?

7. My findings, on above points, are as under :—

(*i*) No.

(*ii*) The Revision Application is dismissed.

Reasons

8. This being a Revision under section 44 of the M.R.T.U & P.U.L.P. Act, it is not necessary to scrutinise rival contentions meticulously. The only material question is whether documents on record are incapable of supporting impugned order ? In other words, whether impugned order is perverse or justifiable ?

9. On perusel of various appointment orders issued to the Complainant, *prima facia* inference drawn by learned Labour Court that he has put in continuous service of more than 240 days, is well justifiable. Last appointment orders nowhere indicate that he was appointed during leave period of other employee. On the contrary, it reflectes that he was appointed as per recommendations of Employment Exchange. In such circumstances, I find that learned Labour Court has rightly granted the reliefs in favour of the Complainant.

10. Shri Shinde, learned advocate representing the Complainant stated that the College continued the Complainant for 4 years but has now orally terminated him six months back and the Complainant will take appropriate action. In my opinion, this latter aspect of the case needs no consideration. Suffice to say that the Complainant can ventilate his grievance, if any, according to provisions of law.

11. To summarise, learned Labour Court has rightly exercised discretion in favour of the Complainant and no interference is called for, at this stage. The College can very well elaborately put his case, while deciding the complaint finally. Accordingly, I answer Point No. 1 in the negatice and pass following order. :—

Order

(*i*) The Revision Application is dismissed.

(*ii*) R. & P. be sent to Labour Court, Sangli immediatly and the parties shall appear there on 27th November, 2002.

(*iii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 13th November 2002.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

BEFORE SHRI C. A. JADHAV, MEMBER

REVISION APPLICATION (ULP) Nos. 29 AND 35/2002.—(1) Deshbhakt Ratnappa Kumbhar Panchaganga Sahakari Sakhar Karkhana Ltd., Ganganagar, Ichalkaranji, District Kolhapur.—*Petitioner.* (Respondent in Revision Application No. 35/2002).—*Versus*—(1) Mr. Sudarshan Bapuso Magdum, A/p. Rukadi, Tal. Hatkanangale, District Kolhapur;—*Respondent No. 1.* (Petitioner in Revision Application No. 35/2002. (2) The Judge, Labour Court, Kolhapur.—*Respondent No. 2.*

CORAM.— Shri C. A. Jadhav, Member.

Appearances— Shri B. D. Manolkar, Advocate for the Petitioner.

Shri D. S. Desai, Advocate for the Respondent No. 1.

Judgement

(Dated the 9th October 2002)

These revisions are arising out of Judgment and Order passed in Complaint (ULP) No. 6/1993 by Labour Court, Kolhapur whereby an employer-sugar factory is directed to reinstate its employee-clerk on his previous post with continuity of service and 40% back wages.

2. Revision Application (ULP) No. 29/2002 is preferred by the sugar factory challenging entire decision, whereas Revision Application (ULP) No. 35/2002 by the clerk to the extent of refusal of full back wages.

3. Admittedly, Respondent of Revision Application (ULP) No. 29/2002 who is petitioner of Revision Appliation (ULP) No. 35/2002 (hereinafter referred to as 'the Complainant') was in employment of Petitioner of Revision Application No. 29/2002 who is Respondent of Revision Application (ULP) No. 35/2002 (hereinafter referred to as 'the sugar factory') as a clerk from 24th August, 1989. He was working on permanent post of a clerk. The sugar factory is registered under the Maharashtra Co-operative Societies Act, 1960 and is governed by the provisions of the Bombay Industrial Relations Act, 1946 as well as the M. R. T. U. & P. U. L. P. Act, 1971.

4. Above complaint was filed on 4th January, 1993 alleging that there was election of Board of Directors of the sugar factory on 15th December, 1992. Therefore, its Directors, Officers and activists compelled its employees to participate in the election campaign and to bring their relatives members of the sugar factory for voting. The Complainant respectfully denied to do so and, therefore, they got annoyed. Eventually, he was not allowed to join duties on 21st December, 1992. He met concerned authorities and requested them to allow him to join duties but was not allowed. It is alleged that he was orally terminated on 21st November, 1992. It is further alleged that his termination by way of retrenchment is without permission of Govt. as well as in violation of Sec. 25-F of the Industrial Disputes Act, 1947. Finally, he prayed for declaration of unfair labour practice, reinstatement with continuity of service and full back wages.

5. The Complainant also filed interim application (Exh. U-2) to direct the sugar factory to allow him to join duties till disposal of main complaint.

6. The sugar factory filed its say at Exh. 11 to the application (Exh. U-2) and adopted the same, *vide* pursis at Exh. C-20 as its written statement. It denied all material allegations made by the Complainant. It is case of the sugar factory that its settled standing orders provide for automaic loss of right of employment if an employee is unauthorisedly absent. In fact, cause of absenty or to abandone the services is not the relevant factor to decide loss of right of employment but the same is automatic. The Complainant remained absent unauthorisedly and thus has automatically lost his right of employment. There is no oral termination at all. Finally, the sugar factory prayed for dismissal of the complaint.

7. The Labour Court framed issues at Exh. 13 and the parties went to the trial. The Complainant examined himself at Exh. U-17 and produced copies of various representations made by him to allow him to join duties, with list Exh. 4. The sugar factory did not lead oral evidence.

8. Learned Labour Court, on perusal of evidence and hearing both parties, held that the sugar factory has failed to establish unauthorised absence of the Complainant. It also held that a domestice enquiry was must even in case of abandonment of service. Ultimately, it accepted plea of oral termination and held that the sugar factory has engaged in an unfair labour practice. As regards back wages, it observed that the Complainant was not deligent in prosecuting his case as the issues were framed on 10th July, 1995 but he entered into witness box on 4th August, 2001. Insuch circumstances, it held that grant of 40% back wages will meet the ends of justice. Ultimately, it allowed the complaint partly, as above, *vide* Judgment and Order dated 1st March, 2002. The same is challenged in these revisions.

9. I heard both parties. Considering rival submissions, following points arise for my determination :—

(1) Whether impugned finding that the sugar factory orally terminated the Complainant on 21st November, 1992 is justifiable ?

(2) Whether impugned finding granting back wages of 40% only is justifiable?

(3) What Order ?

10. My findings, on above points, are as under :—

(1) Yes.

(2) Yes.

(3) Both Revision Applications are dismissed.

Reasons

11. These being revisions under Sec. 44 of the M. R. T. U. & P. U. L. P. Act, 1971 it is not necessary to scrutinise rival contentions meticulously. The only material question is whether documents on record are incapable of supporting impugned order ? In other words, whether impugned order is perverse or justifiable?

12. Shri Manolkar, learned Advocate representing the sugar factory vehemently argued that the Complainant himself abandoned the employment and then filed false and vexatious complaint. In fact, he was informed to resume duties by reply dated 16th December, 1992. However, he failed to attend the duties. Eventually he has lost his right of employment in view of provisions of the settled standing orders. But the Labour Court did not appreciate all such aspects and recorded a perverse finding of oral termination. In support of his arguments he relied on the decision in *Competition Printing Press* V/s. *Jaiprakash Singh & Anr.* reported in 2001-II LLJ at page 1341.

13. Shri Desal learned Advocate representing the Complainant replied that the Complainant has deposed on oath regarding his efforts and willingness to join the duties. There is no evidence in rebuttal. Plea that he was directed to join is for the sake of plea only and to overcome the oral termination. Finding of fact recorded by the learned Labour Court that the sugar factory failed to establish unauthorised absence but the Complainant was willing to join the services is well justifiable and there cannot be reappreciation of evidence while entertaining the revision under Sec. 44 of the M. R. T. U. & P. U. L. P. Act, 1971. He further added that nothing prevented the sugar factory from initiating an enquiry. In support of his arguments he relied on the decision in *Mahamadsha Ganishah Patel & Anr.* V/s. *Mastanbaug Consumer's Co-op. Wholesale & Retail Stores* reported in 1998 I CLR at page 1205.

14. There is substantial merit in arguments of Advocate, Shri Desai. The Complainant has examined himself at Exh. U-17 and has elaborately deposed about his efforts and applications to join the duties. There is no evidence in rebuttal. His testimony is corroborated by documentary evidence. Considering his testimony and number of representations, it is seen that he was bonafidely interested in joining the duties. He is not interested in getting monetary benefits only. He has specifically prayed for reinstatement with continuity of service and full back wages. It is not his case that now his relations to the sugar factory are strained and he be awarded compensation in lieu of reinstatement. In such circumstances, factual finding recorded

by learned Labour Court that the Complainant was willing to join the services but was not allowed is well justifiable. In such circumstances, observations in Competition Printing Press's case are of no help to the sugar factory. In fact, an enquiry was necessary even in case of alleged plea of abandonment of service as held in Mahanadsha Ganishah Patel's case (referred Sugra). It is surprising to note that the sugar factory has not even cared to produce copy of its settled standing orders which speak of automatic termination of service or loss of right of employment on account of unauthorised absence. I, therefore held that finding of oral termination recorded by learned Labour Court is well justifiable. Accordingly I answer point No.1 in the affirmative.

15. Advocate, Shri Desai argued, in the second phase, that normal rule of granting 100% back wages ought to have been followed by the Labour Court while granting reinstatement. There is a nothing on record to show that the Complainant was gainfully employed. In fact, he was helped by his family members. As such, 100% back wages should be ordered.

16. Oral termination is of the year 1992. It is seen that interim application (Exh.U-2) was not seriously pressed. Learned Labour Court made an order on 8th June, 1995 that, therefore, said application should be heard alongwith main complaint (Exh. U-1). The issues were framed on 10th July, 1995 whereas the Complainant stepped into the witness box on 4th August, 2001. In these circumstances, I find that grant of 40% back wages was just and proper. Accordingly I answer point No.2 in the affirmative.

17. To summarise, learned Labour Court has rightly accepted plea of oral termination and disbelieved plea of abandonment of service. It rightly granted 40% back wages considering peculier facts and circumstances of the case. As such, impugned decision no where smells of arbitrariness or perversity. On the contrary, there is every substance in its reasoning. No case is made out calling interference by exercising revisional jurisdiction. Eventually, both revision applications are liable to be dismissed.

18. To conclude, I pass following order :—

Order

(*i*) Both Revision Applications are dismissed.

(*ii*) Copy of this Judgment be kept in other Revision Application.

(*iii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated 9th October, 2002.

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